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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL ATOMIC COMPANY, *Petitioner,*

v.

UNITED NUCLEAR CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FOURTH APPELLATE DISTRICT, DIVISION ONE

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QUESTIONS PRESENTED

1. If an arbitration subject to the Federal Arbitration Act has been held in California and the award resulting from that arbitration has been entered in California, may the California courts refuse to entertain a proceeding to confirm the award under Section 9 of the Federal Arbitration Act on the ground that there is no *in personam* jurisdiction over the losing party to the arbitration?

2. If an arbitration panel has considered briefs and heard oral argument from both parties on a preliminary legal issue of full faith and credit and has ruled against one party to the arbitration in a lengthy reasoned opinion, may a court which is asked to confirm the arbitration award pursuant to Section 9 of the Federal Arbitration Act consider the full-faith-and-credit issue *de novo* and ignore totally the reasons and conclusions stated by the arbitrators?

3. If an arbitration subject to the Federal Arbitration Act has been conducted in California and the awards issued by the arbitrators have been filed in California, may the California courts refuse to entertain a proceeding to confirm the awards on the ground that the courts of New Mexico, where no arbitration session was held and no award was entered, are more "suitable forums" to determine the validity of the awards?

4. Since this Court has held that the New Mexico courts unconstitutionally enjoined arbitration under federal law for a period of more than two years, is it consistent with that judgment and the constitutional principle it vindicated to permit New Mexico judgments entered during the illegal restraint to foreclose the arbitration under the doctrine of full faith and credit?

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FOURTH APPELLATE DISTRICT, DIVISION ONE

Petitioner General Atomic Company (hereinafter "GAC")[1] respectfully prays that a writ of certiorari issue to review two judgments issued by the Court of Appeal of the State of California for the Fourth Appellate District, Division One: (1) an order, filed on December 16, 1980, as modified on December 29, 1980, which provided for the issuance of a peremptory writ of mandate whose terms directed a California State trial court to dismiss GAC's application for confirmation of arbitration awards in its favor; and (2) an order filed on April 21, 1981, dismissing GAC's appeal from the dismissal of its application for confirmation.

OPINIONS BELOW

The Court of Appeal's December 16, 1980, memorandum order as subsequently modified (Pet. App.

[1] General Atomic Company is a partnership whose constituent partners are Gulf Oil Corporation and Scallop Nuclear, Inc. Scallop is a subsidiary of the Royal Dutch/Shell Group.

A, pp. 1a—3a, *infra*) is reported at 113 Cal. App. 3d 359, 169 Cal. Rptr. 827. The rulings of the trial court (the Superior Court of the State of California in and for the County of San Diego) on the issues presented for review were delivered orally from the bench and are not reported. Excerpts of the transcript of these rulings are reproduced at Pet. App. B, pp. 5a—7a, *infra*. No opinion was written by the trial court when, pursuant to the Peremptory Writ of Mandate, it dismissed petitioner's motion for confirmation. Pet. App. G, p. 17a, *infra*. No opinion was written by the Court of Appeal when it dismissed GAC's appeal from that dismissal. Pet. App. H, p. 19a, *infra*.

JURISDICTION

This Petition seeks review of two judgments pursuant to Rule 19.4 of the Rules of this Court.

The California Court of Appeal, an intermediate appellate court, issued its memorandum order directing the issuance of a Peremptory Writ of Mandate (Pet. App. A, pp. 1a—3a, *infra*) on December 16, 1980. The effect of this order was to direct the dismissal of a proceeding initiated by GAC under the Federal Arbitration Act in a California trial court for confirmation of Partial and Final Arbitration Awards issued by an arbitration panel in San Diego, California. GAC filed a timely Petition for Rehearing in the Court of Appeal. It was denied by order filed on January 5, 1981 (Pet. App. C, p. 9a, *infra*). GAC then filed a timely Petition for Hearing seeking further discretionary review in the Supreme Court of California. The California Supreme Court denied the Petition for Hearing by order dated February 18, 1981 (Pet. App. D, p. 11a, *infra*). Because the

California Supreme Court denied discretionary review, this Petition is properly addressed to the Court of Appeal, and the time period computed pursuant to 28 U.S.C. §2101(c) runs from the California Supreme Court's denial of discretionary review. *E.g., American Railway Express Co.* v. *Levee,* 263 U.S. 19, 20-21 (1923). *See Interstate Circuit, Inc.* v. *City of Dallas,* 390 U.S. 676, 678 n.1 (1968); *Chicago & E.I.R.R. Co.* v. *Industrial Commission of Illinois,* 284 U.S. 296, 297 (1932). On May 4, 1981, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari seeking review of the Court of Appeal's issuance of the Peremptory Writ of Mandate to and including June 12, 1981 (Pet. App. E, p. 13a, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). *Bandini Petroleum Co.* v. *Superior Court,* 284 U.S. 6, 8 (1931); *Madruga* v. *Superior Court,* 346 U.S. 556, 557 n.1 (1954).

After the issuance of the Peremptory Writ of Mandate (Pet. App. F, pp. 15a—16a, *infra*), the trial court dismissed the confirmation proceeding in accordance with the writ's terms (Pet. App. G, pp. 17a, *infra*). The order of the Court of Appeal dismissing GAC's appeal from that dismissal was filed on April 21, 1981 (Pet. App. H, p. 19a, *infra*). GAC filed a timely Petition for Rehearing in the Court of Appeal. It was denied in an order filed on May 6, 1981 (Pet. App. I, p. 21a, *infra*). GAC then filed a Petition for Hearing seeking further discretionary review in the Supreme Court of California. The California Supreme Court denied this Petition for Hearing in an order filed on June 8, 1981 (Pet. App. J, p. 23a, *infra*). This Petition is being filed within 90 days of that date. See authorities cited above. Review of the Court of Appeal's second judgment is requested only if

this Court were to conclude, notwithstanding the *Bandini* and *Madruga* cases, that the prior judgment directing the issuance of the Peremptory Writ of Mandate is not "final" for purposes of this Court's jurisdiction. In that event, all issues litigated in connection with the issuance of the writ would be subject to review in connection with the subsequent judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

STATUTES INVOLVED

Sections 9 and 10 of the Federal Arbitration Act, 9 U.S.C. §§9 and 10, provide as follows:

> **§9. Award of arbitrators; confirmation; jurisdiction; procedure**
>
> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court.

If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT

1. Introduction.

In *General Atomic Co.* v. *Felter,* 434 U.S. 12 (1977) (hereinafter "*Felter I*"), this Court held that an injunction issued by a New Mexico State court unconstitutionally denied the Petitioner, GAC, access to federal

tribunals to resolve its disputes with United Nuclear Corporation ("UNC"). Seven months later, in *General Atomic Co.* v. *Felter,* 436 U.S. 493 (1978) (hereinafter "*Felter II*"), acting on a request by GAC for a Writ of Mandamus, this Court affirmed that its earlier decision meant that not only federal litigation, but also arbitration guaranteed by federal law (which had, by then, been enjoined for more than two years), could not constitutionally be interfered with by the New Mexico State courts. As a result of *Felter II,* the State court's unlawful stay of federal arbitration was removed, and an arbitration was conducted under the auspices of the American Arbitration Association ("AAA") in San Diego, California, before a panel chaired by the Hon. Walter V. Schaefer, a former Justice of the Illinois Supreme Court.[2] This case determines whether GAC will be able to enforce the arbitration award in the courts of the State where the arbitration was held.

2. *The Authority Of The Arbitrators.*

UNC sought, both before and after the appointment of the Arbitration Panel, to prevent the arbitration. In a civil suit instituted in the United States District Court for the District of New Mexico in July, 1978, UNC asked that the arbitration be enjoined. UNC claimed that judgments of the New Mexico State court entered in late 1977 and early 1978, while the unconstitutional stay was in effect, were "entitled to full faith and credit" and that they barred the arbitration.

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[2] The background of this dispute and the procedural course it followed before the arbitration began is described in the "Partial Award" of the Arbitration Panel, which is reproduced as Pet. App. K, pp. 25a - 54a, *infra.*

In dismissing UNC's lawsuit, Federal District Judge Howard C. Bratton ruled that the full-faith-and-credit claim asserted by UNC was within the scope of the parties' arbitration clause and could be presented to, and decided by, the Arbitration Panel. Pet. App. M, p. 129a—130a, *infra*. The AAA then selected San Diego, California, as the appropriate locale for the arbitration. Thereafter, UNC filed a "protest" to the arbitration, but participated in the proceeding by filing briefs and presenting legal argument.

3. The Arbitrators' Decision On Full Faith And Credit.

Three days of oral presentations on UNC's full-faith-and-credit claim were held before the full Arbitration Panel[3] in San Diego, California, in March 1979. Following those hearings, UNC instituted a new series of lawsuits in the United States District Court for the Southern District of California, seeking once more to stop the arbitration. Federal District Judge William B. Enright eventually dismissed these actions, agreeing with Judge Bratton that UNC's contention regarding full faith and credit could be properly heard by the arbitrators. Pet. App. N., p. 136a, *infra*.

On November 14, 1979, the majority of the Arbitration Panel issued a 38-page "Partial Award" rejecting UNC's full-faith-and-credit claim.[4] The arbitrators con-

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[3] The members of the Panel other than Justice Schaefer were W. Willard Wirtz, formerly United States Secretary of Labor, and Professor Julian H. Levi.

[4] Justice Schaefer and Mr. Wirtz were in the majority. Mr. Levi filed a dissenting opinion. Both opinions are reproduced as Appendix K, pp. 25a - 79a, *infra*. Voluminous exhibits to Mr. Levi's dissent have been omitted.

cluded that the case presented a "unique" question: "What effect is to be given to a judgment entered by a state court after it has unlawfully barred a litigant from pursuing the federal remedy to which he is entitled?" (p. 44a, *infra*) Justice Schaefer described as "inescapable" the conclusion, based on substantial judicial precedent (p. 47a, *infra*):

> that the Santa Fe Court lacked jurisdiction to proceed after it had unlawfully issued its injunction which prohibited GAC from exercising its Federal remedy. . . . Unless judgments of the Supreme Court of the United States are to be treated as meaningless gestures, the subsequent proceedings of the Santa Fe court were, in the language of the Supreme Court, "coram non judice," and they are not entitled to full faith and credit.

The opinion also rejected on the merits UNC's claim that GAC had "waived" its right to demand arbitration. See pp. 48a—54a, *infra*.

4. The Hearings And Decision On The Merits.

The Panel then scheduled hearings on the merits to be held in San Diego in June 1980. On the eve of these hearings, UNC advised that it would not participate, and UNC's designated arbitrator — Professor Levi — submitted his resignation. After recessing for one week to give UNC an opportunity to rejoin the proceeding, the remaining members of the Panel continued with the scheduled hearings in accordance with the applicable AAA rules. Oral and documentary evidence was presented for two weeks, and GAC was required not only to present a case-in-chief but also to respond to UNC's defenses, which had been asserted in preliminary arbitration pleadings.

On September 12, 1980, the Panel filed a 48-page "Final Award" (Pet. App. L, pp. 81a—124a, *infra*) with the AAA in San Diego. The Award sustained GAC's contract claim and rejected UNC's defenses. The arbitrators awarded GAC $301,181,635 in damages for uranium deliveries UNC had failed to make under a 1973 Supply Agreement, and they ordered specific performance of UNC's future obligations.

5. GAC's Attempt At Federal-Court Confirmation.

On the same day that the "Final Award" was issued in San Diego, GAC filed an Application for Confirmation in the United States District Court for the Southern District of California. The cited basis for federal jurisdiction was Section 9 of the Federal Arbitration Act, 9 U.S.C. §9, which provides that when the parties have not specified a reviewing court, an application for confirmation "may be made to the United States court in and for the district within which such award was made." See p. 4, *supra*. However, on October 24, 1980, the district court dismissed that proceeding on UNC's motion, holding that Section 9 does not confer subject-matter jurisdiction on federal district courts to confirm awards issued under the authority of the Federal Arbitration Act.[1]

6. The Application For State-Court Confirmation.

Having been denied access to federal court, GAC filed an Application for Confirmation in the Superior Court of the State of California in and for the County

[1] An appeal from the dismissal is pending in the Court of Appeals for the Ninth Circuit (*General Atomic Co.* v. *United Nuclear Corp.*, No. 80-5830), and oral argument was heard on June 2, 1981.

of San Diego, the only remaining court "in and for the district within which such award was made." UNC moved to quash service of process for want of *in personam* jurisdiction.

On December 5, 1980, the trial court denied UNC's motion. The judge upheld his personal jurisdiction (p. 6a, *infra*):

> not only on the basis of the agreement under which the arbitration was conducted, but additionally [on the basis of] substantial contact with the State of California to justify in personam jurisdiction.

The trial judge specifically addressed and rejected UNC's argument that because the 1973 Supply Agreement had been declared invalid by a New Mexico default judgment, the arbitration clause in that agreement no longer existed. The judge determined that it would be "inconsistent" to hold, as this Court did in *Felter I* and *Felter II*, "that the New Mexico court did not have the authority to enjoin General Atomic Company from presenting its claim in Federal forums" and "at the same time to hold that [the New Mexico judgment] would preclude jurisdiction" of the California courts to effectuate the right to arbitration. Accordingly, he concluded, "I have before me a determination by the arbitrators of jurisdiction and a denial of res judicata, and it is on that which the Court is exercising jurisdiction." See p. 6a, *infra*.

7. Intervention By The Court of Appeal.

In advance of any hearing on the merits of GAC's application to confirm the arbitration awards, UNC sought to stay or obtain dismissal of the Superior Court proceeding with a Peremptory Writ of Mandate from the California Court of Appeal for the Fourth Appellate

District. GAC replied to UNC's motion by calling attention, *inter alia*, to Section 9 of the Federal Arbitration Act, to the limited judicial review standards of Section 10 of the Federal Arbitration Act and to the decisions of this Court in *Felter I* and *Felter II*. Without requesting plenary briefs or hearing any oral argument, the Court of Appeal — on the second working day after receiving GAC's 54-page response — issued an eight-sentence decision granting the requested Peremptory Writ. The rulings relevant to matters subject to review in this Court were, in their entirety (pp. 1a—3a, *infra*):

(1) that the Superior Court was without any "jurisdictional basis . . . for this action to confirm an arbitration award, because a competent court, the Supreme Court of New Mexico, has held the agreement to arbitrate is void . . . and its decisions are entitled to full faith and credit."

(2) that the "record [did] not reveal a sufficient basis to establish personal jurisdiction over" UNC; and

(3) that "the doctrine of forum non conveniens would require, at minimum, a stay of the action [in the Superior Court] in order to permit" UNC's New Mexico suit for vacation of the arbitration awards "to proceed to judgment."

GAC asserted the federal claims made in this Petition in a Petition for Rehearing and in its Petition for Hearing filed with the California Supreme Court. However, the Petition for Rehearing was denied and the State Supreme Court denied discretionary review.[6]

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[6] After the issuance of the Peremptory Writ of Mandate by the California Court of Appeal, the Santa Fe court which had originally issued the unconstitutional orders involved in *Felter I* and *Felter*

REASONS FOR GRANTING THE WRIT

The California Court of Appeal has peremptorily closed the California courts to enforcement under the Federal Arbitration Act of an arbitration award worth at least half a billion dollars. It has done so with an eight-sentence opinion which cites only State authorities and ignores totally the two opinions of this Court, the relevant provisions of the Federal Arbitration Act, and the controlling decisions of federal courts, all of which were cited and discussed in the briefs of GAC. Each and every aspect of the California court's decision which relates to federal law is demonstrably erroneous, and the ruling below seriously jeopardizes the fair and proper administration of the Federal Arbitration Act in State courts. Moreover, as we demonstrate below, each holding of the State court conflicts with a decision of a federal court of appeals, thereby bringing all the issues within the language and intent of Rule 17.1(b) of the Rules of this Court. Finally, the result of the ruling below is to give UNC the full benefit of the 1976 and 1977 unconstitutional injunction and stay issued by the New Mexico courts, which barred GAC's access to arbitration for more than two years. This effectively deprives GAC of the rights guaranteed it by federal law and by the Constitution — rights which this Court previously vindicated in two summary decisions.

II took additional steps. These are described in our Petition for a Writ of Mandamus which is being filed contemporaneously with the present Petition for Certiorari. See *In re General Atomic Company*, No. 80-2107.

I

FEDERAL LAW REQUIRED THE CALIFORNIA COURTS TO ASSUME PERSONAL JURISDICTION OVER UNC

The Decision Of The California Court Conflicts Squarely With Reed & Martin, Inc. v. Westinghouse Electric Corp., 439 F.2d 1268 (2d Cir. 1971).

Without referring to the language of the Federal Arbitration Act or to federal cases cited to it by GAC, the Court of Appeal ruled erroneously that the California courts lacked *in personam* jurisdiction over UNC in a proceeding instituted under federal law to confirm the arbitration award.[7] Such a ruling cripples enforcement of the Federal Arbitration Act by enabling parties who are unwilling to arbitrate to avoid the jurisdiction of courts where the arbitration is held and an award is entered. Three distinct reasons, firmly established as a matter of federal law, required the California courts to assume jurisdiction over UNC:

(1) The Language Of The Arbitration Clause

The arbitration clause in the 1973 Supply Agreement[8] contains two terms that have become common in

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[7] The basis of this decision was that "the Supreme Court of New Mexico has held the agreement to arbitrate is void . . . and its decisions are entitled to full faith and credit" (p. 1a, *infra*). The impropriety of this asserted basis is shown in Point II below and especially footnote 13.

[8] The arbitration clause provides:

> In the event that any disputes, which may arise between the parties during the course of this Agreement, cannot be mutually resolved, either party may elect to submit such disputes to arbitration in accordance with the Rules of the American Arbitration Association. Upon notice of such election, each party

arbitration agreements between commercial parties. It provides that arbitration shall be had "in accordance with the Rules of the American Arbitration Association" and that "judgment upon the award rendered by the Arbitrators may be entered in any Court having jurisdiction thereof." These provisions have been uniformly understood as expressing the consent of the parties to the exercise of *in personam* jurisdiction by courts within whose jurisdiction the arbitration was conducted and the awards were made. See M. Domke, *The Law and Practice of Commercial Arbitration* §17.01, at 155-56 (1968).

Indeed, in *Reed & Martin, Inc.* v. *Westinghouse Electric Corp.*, 439 F.2d 1268, 1276-77 (2d Cir. 1971), the Second Circuit found that an arbitration clause in virtually identical terms conferred personal jurisdiction over a party which had no contacts with the State in which the arbitration took place and had refused to appear in the arbitration at all. Since the party in *Reed & Martin*, like UNC, had agreed to arbitration in accordance with the AAA rules, it could not contest the *in personam* authority of the courts of the jurisdiction selected by the AAA. The decision of the California Court of Appeal conflicts squarely with *Reed & Martin* and with other federal cases to the same effect. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Lecopulos*, 553 F.2d 842, 844 (2d Cir. 1977); *Necchi Sewing Machine Sales Corp.* v. *Sewline Co.*, 194 F.Supp. 602, 604 (S.D.N.Y. 1960).

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shall designate one member of the arbitration panel and the designees shall choose an impartial third member who shall chair the panel.

The panel shall hear and consider the position of each party and shall equitably resolve the dispute by a determination based on the terms and conditions of this Agreement. Such determination shall be final and binding on both parties and judgment upon the award rendered by the Arbitrators may be entered in any Court having jurisdiction thereof.

(2) Section 9 Of The Federal Arbitration Act

The Court of Appeal also rejected without explanation GAC's reliance on the clear language of Section 9 of the Federal Arbitration Act (pp. 4-5, *supra*), which specifies the procedure by which confirmation proceedings are initiated and the parties are brought before the court. When, as is true of the arbitration clause in this case, the parties have "agreed that a judgment of the court shall be entered upon [an arbitration] award" but have not "specif[ied] the court" which is to enter such a judgment, an application for confirmation may be made to a court "in and for the district within which such award was made," in this case San Diego, California. Section 9 then declares that, upon service of notice of an application for confirmation, the court in which the application was made "shall have jurisdiction of such party as though he had appeared generally in the proceeding." It thereby automatically vests the statutorily designated court with *in personam* jurisdiction.

In enacting this provision, Congress obviously intended to avoid expensive litigation over the propriety of the confirmation forum. The process of confirmation, which is the last stage of the arbitration process, goes forward in the jurisdiction where the arbitration was decided. The Court of Appeal's decision conflicts with the Act's language and with its policy and will, unless reversed, enable recalcitrant parties to delay or impede enforcement of their arbitration obligations.

(3) UNC's Participation In The Arbitration

A final basis for the exercise of jurisdiction over UNC that the Court of Appeal rejected was UNC's extensive participation in the arbitration in California. Before it refused to participate further, UNC appeared

in San Diego, albeit "under protest," to attend arbitration hearings. UNC submitted numerous briefs to the Panel in San Diego and generally took part in the arbitration proceeding until it refused to attend the final hearings.[9] Indeed, UNC's counsel affirmatively told the Arbitration Panel during the three days of hearings in March 1979 that:

> MR. OLMSTED: Obviously. I think you have jurisdiction and power to decide whether they are res judicata.
>
> I submit that under the facts and the law you have to decide they are res judicata and collateral estoppel. You could err in making this decision. It doesn't detract from your jurisdiction and power to make the decision on the full faith and credit, is my point.
>
> * * *
>
> But I really won't quarrel with that point too much. Judge Bratton said the panel should decide the full faith and credit claims of United Nuclear. Telephone Unions says that is the first thing you should do. You do have the power, you have the jurisdiction. I submit you actually have the duty under Telephone Union to decide full faith and credit first.

The Court of Appeal could not ignore this participation and conclude that there was no *in personam* jurisdiction over UNC.

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[9] UNC's decision to withdraw at the concluding stage may be contrasted with its earlier decision to argue the full-faith-and-credit question. Obviously, UNC hoped to prevail on that preliminary legal issue. Thus, it presented that question fully, and urged the Arbitration Panel to assume jurisdiction over the issue. Having gambled and lost, it then claimed in the California courts that the Arbitration Panel had no jurisdiction to decide the preliminary legal issue.

The decision of the Court of Appeal on this aspect of the issue of *in personam* jurisdiction seriously threatens the simplicity and efficiency of the mechanism established by the Federal Arbitration Act. A party to an arbitration clause should not be permitted to spend the time and resources of an arbitration panel and the opposing party arguing preliminary legal issues and then contest in a reviewing court the *in personam* jurisdiction of courts in the locale of the arbitration.

II

FEDERAL LAW REQUIRED THE CALIFORNIA COURT TO CONFIRM THE ARBITRATORS' CONSIDERED RULING ON THE FULL-FAITH-AND-CREDIT QUESTION

The Decision Of The California Court Conflicts Squarely With Boston & Maine Corp. v. *Illinois Central Railroad Co., 396 F.2d 425 (2d Cir. 1968).*

The Court of Appeal did not discuss or cite the Federal Arbitration Act in its opinion, even though GAC's confirmation proceeding invoked that Act exclusively and the Act was repeatedly discussed throughout GAC's brief in the Court of Appeal. The principal ground on which the court below based its conclusion that there was "no jurisdictional basis" to confirm the arbitration award was the very same ground which had been urged by UNC to the Arbitration Panel in extensive written briefs and during three days of oral argument in San Diego. UNC's argument had been rejected by a majority of the Panel with a reasoned decision based on its understanding of governing law. Under consistent federal precedent, the arbitrators' legal conclusion must be affirmed unless, as specified in Section 10 of the Federal Arbitration Act, their ruling was tainted by corruption,

evident partiality, misconduct, or misbehavior, or if the arbitrators exceeded their powers.

There was no genuine suggestion of actual corruption, partiality or misconduct. Nor did the arbitrators "exceed their powers" in ruling on the full-faith-and-credit issue. Two federal judges held that the legal issue was one which the arbitrators could resolve,[10] and UNC even conceded the Panel's "jurisdiction and power" in submitting the legal issue for determination. See p. 16, *supra*.

A reading of the "Partial Award" (pp. 25a-54a, *infra*) makes it entirely clear that the arbitrators' decision on UNC's full-faith-and-credit argument was correct. But even if that decision were wrong as a matter of law, a uniform line of federal authority interpreting the Federal Arbitration Act has held that mere errors of law are not grounds for refusing to confirm a federal arbitration award. *See, e.g., Boston & Maine Corp.* v. *Illinois Central Railroad Co.*, 396 F.2d 425 (2d Cir. 1968), *aff'g* 274 F. Supp. 257 (S.D.N.Y. 1967);[11] *Refino* v.

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[10] United States District Judge Bratton said in his decision of September 1978 that "the arbitration panel itself can entertain the questions of *res judicata* and full faith and credit." *United Nuclear Corp.* v. *American Arbitration Association*, No. 78-552-B (D.N.M.) (Pet. App. M, pp. 129a - 30a, *infra*). UNC dismissed its appeal from that decision. United States District Judge Enright also said in his decision of May 7, 1980, that the arbitration forum for considering this claim was "available and being utilized." *United Nuclear Corp.* v. *General Atomic Co.*, No. 79-0329-E (S.D. Cal.) and *United Nuclear Corp.* v. *Gulf Oil Corp.*, No. 80-0339-E (S.D. Cal.) (Pet. App. N, p. 136a, *infra*). UNC also dismissed its appeal from this ruling.

[11] In the *Boston & Maine* case, the issue was whether arbitrators had erroneously failed to give binding effect to the outcome of earlier litigation in State courts. Judge Friendly, writing for a

Feuer Transportation, Inc., 480 F.Supp. 562, 567 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 205 (2d Cir. 1980);[12] *Aerojet-General Corp.* v. *American Arbitration Association*, 478 F.2d 248, 252 (9th Cir. 1973); *National R.R. Passenger Corp.* v. *Chesapeake & Ohio Ry. Co.*, 551 F.2d 136, 141-42 (7th Cir. 1977); *Office of Supply, Republic of Korea* v. *New York Navigation Co.*, 469 F.2d 377, 379 (2d Cir. 1972).

This rule comports with this Court's interpretation of the Federal Arbitration Act, which has vested broad authority in arbitrators acting under comprehensive arbitration clauses to decide conclusively all legal, as well as factual, issues. *See, e.g., Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967); *International Union of Operating Engineers, Local 150* v. *Flair Builders, Inc.*, 406 U.S. 487 (1972).[13]

---

unanimous Second Circuit panel, said that if the legal issue could be considered by the court *de novo*, "we would be disposed to rule in defendant's favor." 396 F.2d at 425. He concluded however (396 F.2d at 426):

> Having submitted the entire controversy, including the claim of "waiver" of arbitration by B&M, to the arbitrators, IC is bound by their decision.

[12] The *Refino* case also concerned an arbitrator's ruling on a claim of *res judicata*. The district judge said (480 F.Supp. at 567):

> [E]ven if the arbitrator erroneously applied the doctrine of *res judicata* to the JLC decision, there would still be no basis for vacating the award. "It is a truism that an arbitration award will not be vacated for a mistaken interpretation of law." *Sobel* v. *Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972).

[13] The Court of Appeal erroneously stated that the Supreme Court of New Mexico "has held the agreement to arbitrate is void" (p. 1a, *infra*). In fact, the New Mexico court held the *entire* 1973 Supply Agreement void as a sanction for a default in discovery. Thus, this is not a case involving a claim analogous to that of fraud in the inducement *of the arbitration clause*, which would, under the

The decision of the Court of Appeal to ignore totally the full-faith-and-credit determination made by the Arbitration Panel and its failure to apply the standards of Section 10 of the Federal Arbitration Act conflict with the decisions of this Court and of federal courts of appeal. It undermines the finality which Congress intended to give to the decisions of arbitrators. The writ of certiorari should be granted to correct this patently erroneous ruling and prevent future misapplications of the statutory standard.

III

FEDERAL LAW PROHIBITS VACATION OF THE AWARD IN ANY JURISDICTION OTHER THAN CALIFORNIA

The Decision Of The California Court Conflicts Squarely With City of Naples v. Prepakt Concrete Co., 490 F.2d 182 (5th Cir. 1974).

The concluding sentences of the decision of the Court of Appeal hold that the New Mexico courts are "the more suitable forums" to determine the validity of the arbitration awards. This holding conflicts squarely with Section 10 of the Federal Arbitration Act, 9 U.S.C. §10, which specifies that in circumstances such as those present here, it is the court "in and for the district wherein the award was made" which is the proper forum for an order vacating an arbitration award. See p. 5, *supra*. Congress did not intend to allow the courts of all fifty States to perform this function.

Prima Paint case, be an issue for the courts to decide. Rather, it is analogous to fraud in the inducement of the underlying contract — which this Court remitted to arbitrators under the language of the comparable arbitration clause in *Prima Paint*.

The federal courts of appeals have repeatedly refused to allow courts other than those specified by the Act to review arbitration awards. In *City of Naples* v. *Prepakt Concrete Co.*, 490 F.2d 182, *modified on other grounds*, 494 F.2d 511 (5th Cir.), *cert. denied*, 419 U.S. 843 (1974), the Fifth Circuit held that the validity of an arbitration award should be determined in Ohio, where the arbitration had taken place, rather than in a district court in Florida, where arbitration had been compelled. The court relied on the fact that the AAA had designated Ohio as the locale for the arbitration pursuant to a provision like that in the 1973 Supply Agreement. The Fifth Circuit held that the Ohio court "was the proper court to confirm, vacate, modify, or correct the arbitration award." 490 F.2d at 184. *Accord, United States* v. *Ets-Hokin Corp.*, 397 F.2d 935, 938-39 (9th Cir. 1968); *see also Marion Manufacturing Co.* v. *Long*, 588 F.2d 538, 540 (6th Cir. 1978).

By calling into question the clear allocation of jurisdiction set out in the Federal Arbitration Act, and heretofore respected by the federal courts, the decision of the court below sanctions forum-shopping that will complicate and delay the confirmation process. The prospect is not a hypothetical one. In this case, each party sought by several means to stay the other's judicial proceeding for review of the arbitration awards. Likewise, *City of Naples* v. *Prepakt Concrete Co.*, *supra*, involved an injunction from one court directed at confirmation proceedings in another. And the facts of *Reed & Martin, Inc.* v. *Westinghouse Electric Corp.*, *supra*, 439 F.2d at 1272-73, disclose one party's attempt, initially successful, to procure from a State court an order restraining confirmation proceedings in a federal court in the jurisdiction where the arbitration took place. The federal courts of appeals in *City of Naples* and in

Reed & Martin met such tactics firmly by reaffirming what the Act clearly requires — that vacation proceedings be conducted where the arbitration itself took place.

The question of the applicability of Section 10 is squarely presented in this case. The court below could not have deferred to the courts of New Mexico without necessarily determining that Section 10 did not limit vacation proceedings to California — a determination with conflicts squarely with decisions of the Fifth and Ninth Circuits. Moreover, it is particularly ironic and unjust that the Court of Appeal should justify its deference by holding that the courts of New Mexico are "intimately familiar" with the issues presented by the arbitration awards (p. 2a, *infra*). The New Mexico courts have no "familiarity" with the arbitration proceedings or with the awards, all of which occurred only after this Court had removed the Santa Fe court's illegal injunction and stay prohibiting arbitration. The New Mexico courts are "familiar" with this arbitration only in the sense that, some two years ago, they unconstitutionally enjoined it.

IV

THE SUPREMACY CLAUSE IS VIOLATED BY A JUDGMENT REFUSING TO CONFIRM THE OUTCOME OF AN ARBITRATION WHICH HAD BEEN UNCONSTITUTIONALLY ENJOINED BY A STATE COURT ON THE GROUND THAT THE ENJOINING COURT'S JUDGMENTS ENTERED WHILE THE INJUNCTION WAS IN EFFECT BARRED THE ARBITRATION

The Decision Of The California Court Conflicts Squarely With Sibley* v. *Tandy Corp., 547 F.2d 286 (5th Cir. 1977).

The California Court of Appeal held that there was "no jurisdictional basis" to proceed with the confirmation because "the Supreme Court of New Mexico has held the agreement to arbitrate is void, and its decisions are entitled to full faith and credit" (p. 1a, *infra*). By giving such conclusive effect to New Mexico judgments which were entered while the unconstitutional "stay" of federal arbitration was in effect, the California court failed to implement this Court's past decisions in this dispute and compounded the New Mexico courts' prior violations of the Supremacy Clause.

The injunction and stay condemned in *Felter I* and *Felter II* delayed arbitration in this case for over two years. During the same time that it kept arbitration at a standstill with its unconstitutional injunction and stay, the New Mexico court proceeded to a default judgment, thereby concluding the State proceeding before the federally guaranteed remedy was even permitted to begin. The California Court of Appeal has now held that the Panel in an arbitration which had been illegally enjoined for over two years was obliged to implement

New Mexico judgments that were obtained only because the unlawful restraint on arbitration permitted the lawsuit to proceed.

It is a well-established principle "of general application" in this Court "that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error." *Atlantic Coast Line R.R. Co.* v. *Florida,* 295 U.S. 301, 309 (1935), and authorities there cited. In *Arkadelphia Milling Co.* v. *St. Louis S.W.Ry. Co.,* 249 U.S. 134, 145-46 (1919), this Court said that it was "clearly consistent with the principles of equity" and "inherent in every court of justice" to "correct that which has been wrongfully done by virtue of its process." To this end, the Court said, "a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby." *Id.* at 145. *See also Reed* v. *Allen,* 286 U.S. 191, 203 (1932) (Cardozo, Brandeis and Stone, JJ., dissenting).

The above principles were flagrantly violated in this litigation. Rather than wiping away the effects of the unlawful injunction and stay against arbitration under federal law, which had been in force for more than two years, the New Mexico court capitalized upon the delay that it had caused in the California arbitration. It entered judgments against GAC while the unconstitutional stay was still in effect, and UNC has now persuaded the court below that these judgments — which were the "fruit" of the unconstitutional injunction — barred the arbitration.

The Arbitration Panel saw through this obvious exploitation of an illegal order. The arbitrators ruled that

any judgment of the New Mexico courts entered while GAC was enjoined from proceeding in other forums (including arbitration) could not be asserted as a permanent bar to arbitration. Justice Schaefer and Mr. Wirtz correctly concluded that to accept UNC's argument would be to treat this Court's decisions in *Felter I* and *Felter II* as "meaningless gestures" (p. 47a, *infra*). The California trial judge also recognized that it would be "inconsistent" with *Felter I* and *Felter II* to permit the default judgment of the New Mexico court to deprive the California courts of *in personam* jurisdiction to confirm the result of the arbitration which the New Mexico court had unlawfully enjoined. p. 6a, *infra.*

The Arbitration Panel correctly realized that if arbitration has erroneously been delayed, the party who is responsible for the delay may not capitalize on the error. In *Sibley* v. *Tandy Corp.*, 543 F.2d 540 (5th 1976), *rehearing denied,* 547 F.2d 286, *cert. denied,* 434 U.S. 824 (1977), the Court of Appeals for the Fifth Circuit held that arbitration had erroneously been deferred until after a jury trial. It then refused to allow a party to benefit from findings entered during the jury trial, because that trial should not have preceded the arbitration. See 547 F.2d at 287.[14]

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[14] The Fifth Circuit explained the policy reasons for its decision as follows (547 F.2d at 287):

> Having persuaded the court to choose a course 180 degrees off the correct one, Parker has little force to his argument that he should be permitted to enjoy the substantial benefits of a trial that should not have been held. We have previously rejected such an argument, *General Guaranty Ins. Co.* v. *New Orleans General Agency, Inc.*, 427 F.2d 924, 929 (C.A.5, 1970), and we do so again. The argument is inconsistent with the policies underlying the Arbitration Act. It is inconsistent with judicial recognition of arbitration as a socially desirable instrumentality for the settlement of disputes outside the courtrooms of beleaguered courts. In the long run, acceptance of it would ill serve both the courts and those who voluntarily contract to arbitrate their disputes.

The Santa Fe court's illegal injunction and stay against arbitration withheld from GAC the right to proceed to immediate arbitration under federal law. The Santa Fe judgments which were issued while GAC was denied this access to arbitration cannot be given full effect without violating this Court's rulings and the Supremacy Clause. The decision of the Court of Appeal to the contrary conflicts with the decisions of this Court in this dispute and with the decision of the Fifth Circuit in *Sibley* v. *Tandy Corp., supra.*

CONCLUSION

This Petition relates exclusively to the judgments entered in the California State courts. We are filing, contemporaneously with this Petition, a Petition for a Writ of Mandamus directed to an order of the Santa Fe trial court "vacating" the arbitration awards made in San Diego, California. For reasons stated in that Petition and in this one, we submit that the Petition for a Writ

of Certiorari should be granted and the case consolidated with the Petition for a Writ of Mandamus in *In re General Atomic Company*.

Respectfully submitted,

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(Counsel of Record)

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June 1981

APPENDIX

APPENDIX A

Civ. 24286.

Court of Appeal, Fourth District, Division 1

UNITED NUCLEAR CORPORATION, *Petitioner,*

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO, *Respondent,*

GENERAL ATOMIC COMPANY, *Real Party in Interest*

Dec. 16, 1980.

As Modified Dec. 29, 1980.

Procopio, Cory, Hargreaves & Savitch and Paul B. Wells, Richard H. Benes, San Diego, and Michael J. Radford, Chula Vista, and Bigbee, Stephenson, Carpenter, Crout & Olmsted and Donnan Stephenson, Santa Fe, N.M., for petitioner.

Gray, Cary, Ames & Frye and F.P. Crowell and James F. Stiven, San Diego, for real party in interest.

No appearance for respondent Superior Court.

GERALD BROWN, *Presiding Justice*

This court has read and fully considered the petition for peremptory writ of mandate, etc. filed here on December 8, 1980, as well as all accompanying exhibits, the response to the petition, and all documents filed to date in this matter. The court finds no jurisdictional basis in the San Diego Superior Court for this action to confirm an arbitration award, because a competent court, the Supreme Court of New Mexico, has held the agreement to arbitrate is void (*United Nuclear Corp.* v. *General Atomic Co.* (1979) 93 N.M. 105, 597 P.2d 290; *United Nuclear Corp.* v. *General Atomic Co.* (August 29, 1980), _____ N.M. _____, _____ P.2d _____), and its decisions are entitled to full faith and credit. (*See Thorley* v.

Sup. Ct., 78 Cal.App.3d 900, 144 Cal. Rptr. 557. As to jurisdiction, see *Main* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal.App.3d 19, 26, 27, 136 Cal.Rptr. 378; *Commercial Factors* v. *Kurtzman Bros.*, 131 Cal.App.2d 133, 280 P.2d 146.) Although the procedure to challenge jurisdiction provided by Code of Civil Procedure section 418.10 is clearly available here and should have been followed (*Frey & Horgan Corp.* v. *Sup. Ct.*, 5 Cal.2d 401, 55 P.2d 203; *Atkins, Kroll & Co.* v. *Broadway Lumber Co.*, 222 Cal.App.2d 646, 35 Cal.Rptr. 385; and cf. *Hartford* v. *Sup. Ct.*, 47 Cal.2d 447, 304 P.2d 1), it would serve no purpose to remand this matter to permit petitioner to invoke the statute, because there is no jurisdiction for the trial court to do anything other than dismiss the proceeding. We note, for completeness, this record does not reveal a sufficient basis to establish personal jurisdiction over petitioner (*Sibley* v. *Sup. Ct.*, 16 Cal.3d 442, 128 Cal.Rptr. 34, 546 P.2d 322; *Archibald* v. *Cinerama Hotels*, 15 Cal.3d 853, 863-864, 126 Cal.Rptr. 811, 544 P.2d 947; *Northern Natural Gas. Co.* v. *Sup. Ct.*, 64 Cal.App.3d 983, 991, 134 Cal. Rptr. 850; *Floyd J. Harkness Co.* v. *Habermann*, 60 Cal.App.3d 696, 698, 131 Cal.Rptr. 672; *Regents of University of New Mexico* v. *Sup. Ct.*, 52 Cal.App.3d 964, 125 Cal.Rptr. 413; *Watson's Quality Turkey Products, Inc.* v. *Sup. Ct.*, 37 Cal.App.3d 360, 364-365, 112 Cal.Rptr. 345), and even if it did, the doctrine of forum non conveniens would require, at minimum, a stay of the action here, in order to permit the pending action in the Santa Fe district court in New Mexico, in which the arbitration award is challenged, to proceed to judgment. Also, even if that action were not pending, the courts of New Mexico are obviously the more suitable forums to determine these issues with which they are intimately familiar. The parties have wasted too much time already in adding to the many forums in which they have litigated the state courts of California.

Let a peremptory writ of mandate issue (Code Civ.Proc., §1088; *Krasley* v. *Sup. Ct.*, 101 Cal.App.3d 425, 433, 161 Cal.Rptr. 629; *Goodenough* v. *Sup. Ct.*, 18 Cal.App.3d 692,

697, 96 Cal.Rptr. 165) directing the superior court to dismiss this action.

COLOGNE and STANIFORTH, JJ., *concur.*

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

DEPARTMENT NO. 33 BEFORE HON. JACK R. LEVITT, JUDGE

No. 460547

GENERAL ATOMIC COMPANY, *Applicant,*

and

UNITED NUCLEAR CORPORATION, *Respondent.*

(AAA Case No. 73-10-0078-77)

Reporter's Transcript

Friday, December 5, 1980

APPEARANCES:

For the Applicant: GRAY, CARY, AMES & FRYE
By: FREDERICK P. CROWELL
JAMES F. STIVEN
2100 Union Bank Building
San Diego, California 92101
236-1661
and
Mr. Nathan Lewin

For the Respondent: PROCOPIO, CORY, HARGREAVES & SAVITCH
By: PAUL B. WELLS
530 "B" Street,
Suite 1900
San Diego, California 92101
and
BIGBEE, STEPHENSON, CARPENTER, CROUT & OLMSTED

By: MR. DONNAN STEPHENSON
JEAN YARNELL SULZNER,
CSR #2773
Official Reporter
Superior Court
[pp. 34-35]

THE COURT: The Court has had an opportunity to review the response of United Nuclear Corporation and to read the decisions and opinions which were urged upon me to be read. It's a most intriguing problem, and it's most unfortunate that the Court doesn't have the luxury of more time to study and digest it; however, I'm satisfied from my reading of the cases and from my analysis of the circumstances that the Court's ruling, which is that the Court has jurisdiction, is a proper ruling. The Court makes this finding not only on the basis of the agreement under which the arbitration was conducted, but additionally under the circumstances presented to the Court that there has been substantial contact with the State of California to justify in personam jurisdiction. There has been more than a minimum contact.

While I have great reluctance and reservation and some trepidation in refusing to grant res judicata to decisions of a sister jurisdiction, I'm convinced that the that the [sic] United States Supreme Court has made it abundantly clear that a State Court is without power under the United States Constitution to interfere with a person's absolute right to present its claims in Federal forums. To conclude that the New Mexico court did not have the authority to enjoin General Atomic Company from presenting its claim in Federal forums and pursuant to the Federal arbitration sections, and at the same time to hold that it would preclude jurisdiction of this Court to make that effectual on the basis that the underlying agreement was void, would be inconsistent.

I have before me a determination by the arbitrators of jurisdiction and a denial of res judicata, and it is on that which the Court is exercising jurisdiction.

Accordingly, the Court's ruling is that it has jurisdiction to hear the application and motion which has been calendared for this morning and to which there has been no response by United Nuclear Corporation.

APPENDIX C

COURT OF APPEAL — STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

---

4 Civil No. 24286
SUPERIOR COURT NO. 460547

UNITED NUCLEAR CORPORATION, *Petitioner,*

v.

SUPERIOR COURT ETC., COUNTY OF SAN DIEGO, *Respondent,*

GENERAL ATOMIC COMPANY, *Real Party in Interest.*

(Filed January 5, 1981)

THE COURT:

The petition for rehearing is denied.

/s/ BROWN
Presiding Justice

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

UNITED NUCLEAR CORPORATION, *Petitioner,*

v.

THE SUPERIOR COURT OF
SAN DIEGO COUNTY, *Respondent;*
GENERAL ATOMIC COMPANY, *Real Party in Interest.*

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
4th District, Division 1, Civil No. 24286

(Filed February 18, 1981)

Petition of real party in interest for hearing DENIED.

/s/ BIRD
Bird, *Chief Justice*

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-899

GENERAL ATOMIC COMPANY, *Petitioner*

v.

UNITED NUCLEAR CORPORATION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 12, 1981.

/s/ WILLIAM H. REHNQUIST
William H. Rehnquist
Associate Justice of the Supreme Court of the United States

Dated this 4th
day of May, 1981.

APPENDIX F

COURT OF APPEAL — STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

---

4 Civil No. 24286
Superior Court No. 460547

UNITED NUCLEAR CORPORATION, *Petitioner,*

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO, *Respondent,*

GENERAL ATOMIC COMPANY, *Real Party in Interest.*

PEREMPTORY WRIT OF MANDATE

(Filed March 20, 1981)

TO: Superior Court of the State of California for the County of San Diego, Respondent:

After hearing and determination by this Court that you have failed to perform your legal duty by denying petitioner's motion to dismiss that proceeding entitled, "GENERAL ATOMIC COMPANY, Applicant and UNITED NUCLEAR CORPORATION, Respondent (AAA Case No. 73-10-0078-77)" San Diego County Superior Court Case No. 460547, judgment has been entered in this proceeding, 4 Civil No. 24286, ordering that a peremptory writ of mandate issue under the seal of this Court.

THEREFORE, you are commanded, immediately upon receipt of this writ to dismiss San Diego County Superior Court Case No. 460547.

You are further commanded to serve and file a written return to this writ on or before March 30, 1981.

DATED March 20, 1981

/s/ ROBERT L. FORD, *Clerk*
Robert Ford

/s/ RICHARD J. SMITH
Richard J. Smith
Chief Deputy

APPENDIX G

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

Case No. 460547
Order and Judgment of Dismissal

GENERAL ATOMIC COMPANY, *Applicant,*

and

UNITED NUCLEAR CORPORATION, *Respondent.*

(AAA Case No. 73-10-0078-77)

(Filed April 3, 1981)

Based on a peremptory writ of mandate received on March 20, 1981 from the Court of Appeal, Fourth Appellate District, this matter is dismissed.

/s/ JACK R. LEVITT
Jack R. Levitt
Judge of the Superior Court

Dated: April 3, 1981

Nunc Pro Tunc to
March 20, 1981

APPENDIX H

COURT OF APPEAL — STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

---

4 Civil No. 24645
SUPERIOR COURT NO. 460547

GENERAL ATOMIC COMPANY, *Appellant,*

v.

UNITED NUCLEAR CORPORATION, *Respondent.*

(Filed April 21, 1981)

THE COURT:

The appeal is dismissed.

/s/ BROWN
Presiding Justice

APPENDIX I

COURT OF APPEAL — STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

---

4 Civil No. 24645
SUPERIOR COURT NO. 460547

GENERAL ATOMIC COMPANY, *Appellant,*

v.

UNITED NUCLEAR CORPORATION, *Respondent.*

(Filed May 6, 1981)

THE COURT:

This frivolous petition for rehearing is denied.

/s/ BROWN
Presiding Justice

APPENDIX J

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

ORDER DENYING HEARING AFTER JUDGMENT BY THE COURT OF APPEAL
4th District, Division 1, Civil No. 24645

GENERAL ATOMIC COMPANY

v.

UNITED NUCLEAR CORPORATION

(Filed June 8, 1981)

Appellant's petition for hearing DENIED.

/s/ BIRD
Bird
Chief Justice

APPENDIX K

AMERICAN ARBITRATION ASSOCIATION

No. 73-10-0078-77

IN THE MATTER OF AN ARBITRATION BETWEEN GENERAL ATOMIC COMPANY (GAC)

AND

UNITED NUCLEAR CORPORATION (UNC)

PARTIAL AWARD

(Received November 14, 1979)

AMERICAN ARBITRATION SAN DIEGO

RES JUDICATA, FULL FAITH AND CREDIT

WAIVER OF ARBITRATION

This arbitration is conducted under the auspices of the American Arbitration Association pursuant to a demand for arbitration filed by General Atomic Company (GAC) upon United Nuclear Corporation (UNC) on November 29, 1977.

The arbitration clause is as follows:

> In the event that any disputes, which may arise between the parties during the course of this Agreement, cannot be mutually resolved, either party may elect to submit such disputes to arbitration in accordance with the Rules of the American Arbitration Association. Upon notice of such election, each party shall designate one member of the arbitration panel and the designees shall choose an impartial third member who shall chair the panel.
>
> The panel shall hear and consider the position of each party and shall equitably resolve the dispute by a determination based on the terms and conditions of this

Agreement. Such determination shall be final and binding on both parties and judgment upon the award rendered by the Arbitrators may be entered in any Court having jurisdiction thereof.

Under that clause GAC has designated Willard Wirtz as its arbitrator and UNC has designated Julian Levi as its arbitrator. Those designees chose Walter V. Schaefer as the impartial third member and chairman of the panel. It should be noted at the outset that at the first arbitration hearing each of the party designated arbitrators stated his intention to be completely impartial with respect to any determinations made by the panel. It should also be noted that UNC is participating in this arbitration under protest.

To an unusual degree, the outcome of this arbitration depends not only upon the terms of the contract and the conduct of the parties thereunder but also upon the significance of several judgments of the Supreme Court of the United States, the Supreme Court of New Mexico and the United States District Court for New Mexico, as well as other judicial decisions. A summary of prior events and proceedings is essential to an understanding of the issues that now confront the arbitration panel.

GAC is a partnership composed of Gulf Oil Corporation (Gulf) and Scallop Nuclear, Inc. (Scallop). (There were references at a hearing before the Panel on March 26, 1979, to a change in the relationship of the partners. Whatever may be the internal effect of that change, it can not alter the rights and liabilities of the partnership with respect to third persons.) UNC owns uranium deposits in New Mexico and is engaged in mining and milling uranium and the fabrication of uranium into fuel.

Between 1966 and May of 1971 UNC entered into long term agreements with four utilities to supply them with large quantities of uranium concentrates and with finished nuclear-reactor fuel. In the summer of 1971 UNC and Gulf formed a jointly owned corporation known as Gulf United Nuclear Fuels Corporation (GUNF). UNC owned 43% of the stock of

GUNF, and Gulf owned 57%. By what is known as the 1971 Supply Agreement, UNC then assigned its agreements with the utilities to GUNF, and agreed to supply GUNF with the uranium necessary to perform those contracts. UNC retained its mining and milling properties and facilities, but transferred its fabrication facilities to GUNF. Thereafter, in 1973 Gulf purchased UNC's interest in GUNF which became a wholly owned subsidiary of Gulf. UNC and GUNF then entered into the agreement which is the subject of this arbitration, which is referred to as the 1973 Supply Agreement. That agreement replaced the 1971 Supply Agreement.

GUNF was then merged into Gulf and in 1974 Gulf transferred to GAC the agreements with the utilities and the rights and obligations under the 1973 Supply Agreement, as well as the physical facilities of GUNF.

The price of uranium began to increase sharply during and after 1973 and it has continued to rise at least until the commencement of the hearings in this arbitration. Until the summer of 1975 UNC continued to deliver uranium pursuant to the 1973 supply agreement.

In 1975 UNC ceased to make deliveries, and on August 8, 1975, UNC brought an action in Santa Fe District Court against GAC, Gulf and Scallop. The complaint alleged that the 1973 supply agreement was void as a result of Gulf and GAC's fraud, economic coercion, breach of fiduciary duties and violations of the New Mexico antitrust act. The complaint also sought relief on the ground that performance of its long term agreements had become commercially impractical. The defendants removed the action to the United States District Court on diversity grounds. UNC then voluntarily dismissed its action on December 31, 1975.

On the same day UNC instituted another action in the Santa Fe County District Court. The complaint was identical with that filed in the earlier action, except that diversity of citizenship was eliminated because Gulf and Scallop were not named as defendants in the second action.

GAC filed motions to dismiss. On March 15, 1976, at the request of UNC, the trial judge entered a temporary restraining order, and on April 2, 1976 a temporary injunction, directed to GAC and its partners. The injunction stated: "This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto." On April 14, 1976 the New Mexico Supreme Court granted an alternative writ of prohibition staying "the enforcement of the injunction". On June 15, 1976, however, that court, without opinion, quashed the alternative writ as improvidently granted. GAC sought a writ of certiorari to review that judgment of the Supreme Court of New Mexico. UNC opposed the allowance of certiorari on the theory that the judgment was based upon adequate state grounds.

The Supreme Court of the United States issued a memorandum order on November 29, 1976 (429 U.S. 973, 50 L.Ed. 2d, 581, 97 S.Ct. 479), which stated that the petition for writ of certiorari to the Supreme Court of New Mexico was granted and the judgment of that Court was vacated and the cause remanded to the Supreme Court of New Mexico to consider whether the judgment was "based upon Federal or State grounds or both." Pursuant to that mandate the Supreme Court of New Mexico rendered its further opinion on February 21, 1977. (560 Pac.2d. 541.) The Court there held that the New Mexico trial court had inherent equity power to issue an injunction restraining the parties to a suit before it from instituting further proceedings concerning the same subject matter.

The case was brought again to the Supreme Court of the United States, which granted certiorari and on October 31, 1977 reversed the judgment of the Supreme Court of New Mexico and remanded the case to that Court for "further proceedings not inconsistent with this opinion." The Chief

Justice and six Associate Justices concurred in the per curiam opinion. Mr. Justice Blackmun would not have disposed of the case summarily but would have granted certiorari and heard argument. Mr. Justice Rhenquist dissented. *General Atomic Co.* v. *Felter,* 434 U.S. 12, 54 L.ed. 2d 199.

While the authority of the Santa Fe trial court to enjoin federal arbitration and judicial proceedings was being determined in the United States Supreme Court, activity had continued in the trial court. On April 5, 1976, UNC had filed an amended complaint which added a count alleging that a 1974 supply agreement between GAC and UNC was also invalid because of economic coercion; on May 5, 1976, GAC had answered the amended complaint and filed a counterclaim, and there had been extensive discovery. (Whether GAC had waived its right to arbitrate by any action it took in this case or in other proceedings will be subsequently discussed.)

The case had been set for trial in the Santa Fe court on October 31, 1977. That was the day on which the Supreme Court of the United States entered its judgment reversing the Santa Fe court's injunction and holding:

> "We conclude that the New Mexico Supreme Court's distinction is un-tenable and that *the injunction is in direct conflict with* that decision and *the Supremacy Clause of the Constitution.*" (Emphasis supplied. The decision referred to is *Donovan* v. *Dallas,* 337 U.S. 408 (1964).)

On November 3, 1977 GAC made an oral motion to vacate the injunction. UNC opposed the motion. Its attorney suggested that UNC might file a petition for rehearing, and urged the court to wait for the mandate of the Supreme Court of New Mexico. He stated: "We need the injunction more than ever." By agreement the motion to vacate was continued until November 6, 1977, and on that date it was denied. The injunction remained in effect and the trial proceeded while the formal mandates were making their way back from the Supreme Court of the United States to the Supreme Court of New Mexico, and from that court to the Santa Fe court.

When the mandate got back to Santa Fe, the court modified its injunction on November 28, 1977. On November 29, 1977, GAC filed its demand for arbitration, and on the following day moved to stay proceedings in the Santa Fe court. On December 6, 1977, UNC moved for an order staying the arbitration and submitted proposed findings and conclusions and a proposed partial final judgment.

On December 16, 1977, the Santa Fe court adopted the proposed findings of fact and conclusions of law concerning the "issue of arbitration" which had "been submitted for summary determination on December 6, 1977." On the basis of those findings and conclusions the court entered its "partial final judgment" which stayed "until the further order of the court," the present arbitration proceeding, as well as other arbitration proceedings in North Carolina and Illinois. The order also contained the following provisions:

> "Provided, however that this Partial Final Judgment shall not, in and of itself, operate to preclude Defendant General Atomic Company from asserting claimed federal rights in appropriate judicial proceedings.
>
> IT IS FURTHER ORDERED, DECLARED, DETERMINED AND ADJUDICATED that Defendant General Atomic Company has no right to arbitrate any issue in the aforesaid arbitration proceedings or pending herein against Plaintiff, United Nuclear Corporation."

By a separate order of December 16, 1977, entered in accordance with the following finding,

> "22. On November 28, 1977, GAC declared in open court that it intended to pursue relief under the Federal Arbitration Act and requested the court to stay the trial of this case pending resolution of those matters. The court declined to stay proceedings."

the court denied GAC's motion to stay the trial.

Subsequently, on December 27, 1977, the court entered another "partial final judgment," which again denied GAC's motion to stay proceedings. This latter order was apparently a

formal step regarded as necessary or desirable to put the previous order refusing to stay the trial into appropriate form for an interlocutory appeal. It was accompanied by findings and conclusions which were identical with those that accompanied the December 16, 1977 order. Neither set of findings and conclusions, and neither "partial final judgment" mentioned the judgment of the Supreme Court of the United States, which had determined that the injunction that restrained GAC from seeking federal arbitration was in violation of the Supremacy Clause of the Constitution.

On March 3, 1978, GAC filed a motion in the Supreme Court of the United States for leave to file a petition for an original writ of mandamus directing the Santa Fe court to vacate its orders of December 16, 1977, and December 27, 1977, on the ground that they violated the mandate of the Supreme Court of the United States in *General Atomic* v. *Felter*, 54 L.Ed. 2d 199.

While the case was again making its way to the Supreme Court of the United States, the proceeding before the Santa Fe court was continuing, and on March 2, 1978, the Santa Fe court entered a "Sanctions Order and Default Judgment" which ordered the striking of GAC's answer and counterclaim. That order was entered pursuant to Rule 37 of the New Mexico Rules of Civil Procedure for failure to comply with discovery orders. On April 4, 1978 the Santa Fe Court entered its Declaratory Judgment as to the issues between UNC and GAC. That order stated:

> "A. The 1973 Uranium Supply Agreement executed on September 12, 1973, as of June 30, 1973 between United Nuclear Corporation, Gulf Oil Corporation and Gulf United Nuclear Fuels Corporation is null, void, unenforceable and of no effect whatever and performance thereunder is excused.
>
> B. The Uranium Concentrates Agreement between United Nuclear Corporation and General Atomic Company dated June 28, 1974 is null, void, unenforceable and of no effect whatever and performance thereunder is excused.

C. General Atomic Company is obligated to indemnify and save United Nuclear Corporation harmless from any and all claims, causes of action, liabilities, obligations, damages, costs and expenses arising out of, or in any way connected with or relating to the latter's failure to deliver or perform under the aforesaid 1973 Uranium Supply Agreement or any other contract with an electric utility company covered by or related to said agreement.

D. General Atomic Company's defenses to United Nuclear Corporation's First Amended Complaint, as set forth in its Answer and in the Pre-trial Order, should be, and is hereby, stricken and held for naught.

E. General Atomic Company's Counterclaim against United Nuclear Corporation and each and every count thereof, as stated in said Counterclaim and in the Pre-trial Order should be, and is hereby, stricken and held for naught."

On May 17, 1978, the Santa Fe court entered its final judgment on damage issues in favor of UNC and against GAC.

On May 30, 1978, the Supreme Court of the United States issued its opinion and judgment in the original mandamus action. (436 U.S. 493, 56 L.ed.2d 480). The per curiam opinion stated:

"Petitioner has filed a motion for leave to file a petition for a writ of mandamus and requests that a writ of mandamus issue to the District Court for the First Judicial District, Santa Fe County, N.M., directing the court to vacate two orders on the ground that they violated this Court's mandate in *General Atomic Co.* v. *Felter,* 434 US 12, 54 L Ed 2d 199, 98 S Ct 76 (1977)"

"In that opinion we held that under the Supremacy Clause of the United States Constitution the Santa Fe court lacked power to enjoin General Atomic Company (GAC) from filing and prosecuting in personam actions against United Nuclear Corporation (UNC) in federal

court. Upon remand, the Santa Fe court modified its injunction 'to exclude from its terms and conditions all in personam actions in Federal Courts and all other matters mandated to be excluded from the operation of said preliminary injunction by the opinion of the Supreme Court, dated October 31, 1977,' Shortly thereafter, GAC filed a demand for arbitration with UNC of issues growing out of the 1973 uranium supply agreement around which the litigation between the parties revolves. This demand, filed with the American Arbitration Association, relied upon the Federal Arbitration Act, . . . and the arbitration clause of the 1973 agreement."

* * *

"Finally, GAC requested the Santa Fe court to stay its own trial proceedings with respect to issues subject to these arbitration demands. UNC, in addition to opposing this motion, also asked the court to stay the arbitration proceedings.

On December 16, 1977, the Santa Fe court issued a decision in which it concluded that GAC had waived any right to arbitration with UNC which it might have had because it failed to demand arbitration in a timely manner and that neither the Duke nor Commonwealth Agreements gave GAC any right to demand arbitration with UNC. On the basis of these conclusions, Judge Felter filed the following order staying the arbitration proceedings:

* * *

"In its order of December 16, 1977, the Santa Fe court has again done precisely what we held that it lacked the power to do: interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration. Clearly, our prior opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our

prior decision prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums. But, as demonstrated supra, we have held that the Santa Fe court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration or for any other reason whatsoever. GAC, as we previously held, has an absolute right to present its claims to federal forums."

* * *

"A litigant, who, like GAC, has obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment of this Court. In light of the prior proceedings in this matter, it is inconceivable that upon remand from this Court the Santa Fe court was free to again impede GAC's attempt to assert its arbitration claims in federal forums. Because the Santa Fe court has refused or failed to comply with the judgment of this Court, petitioner's motion for leave to file a petition for a writ of mandamus is granted. Assuming as we do that the Santa Fe court will now conform to our previous judgment by promptly vacating or modifying its order of December 16, 1977 to the extent that it places any restriction whatsoever upon GAC's exercise of its right to litigate arbitration claims in federal forums, we do not at present issue a formal writ of mandamus."

In the following footnote the Supreme Court explained why it did not order the Santa Fe court to vacate or modify its order of December 27, 1977:

"We do not read the December 27, 1977, order as restricting GAC from pursuing its arbitration claims in other forums. Consequently there is no occasion to disturb it."

The main thrust of the opinion of the Supreme Court of the United States is that under the Supremacy Clause of the federal Constitution the New Mexico trial court lacked power — and therefore was without jurisdiction — to enjoin GAC from presenting its claim to arbitration to a federal arbitration panel. The Court squarely held that by its December 16, 1977 order "the Santa Fe Court has again done precisely what we held that it lacked power to do: interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration." And the Court further pointed out "that the Santa Fe Court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration or for any other reason whatsoever. GAC, as we previously held, has an absolute right to present its claims to federal forums."

Problems of interpretation of the opinion, however, have resulted from the following two sentences:

> "Clearly, our prior opinion did not preclude the court from making findings concerning whether GAC has waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decision prevent the Santa Fe Court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums."

On the basis of these two sentences UNC argues that the Supreme Court has decided that the Santa Fe court had jurisdiction to determine whether GAC had any right to arbitrate and if it did, whether that right had been waived. UNC also argues that the Supreme Court has determined that the Santa Fe court proprerly refused to stay its own trial proceedings pending arbitration.

There is a surface plausibility to these contentions, but they will not withstand analysis in the light of the procedural posture of the case before the Supreme Court of the United

States and the limitations upon that Court's jurisdiction in an original action of mandamus.

The issuance of such a writ to compel obedience is a prior mandate of the Supreme Court of the United States is an extraordinary remedy, and under the Supreme Court's procedural and jurisdictional rules, the mandamus petition filed by GAC could present to the Court only the question of compliance with the Supreme Court's prior mandate. (See Supreme Court Rule 31(3).) It could not properly bring before that Court any matters that were not embraced within that prior determination.

In applying those rules the Supreme Court recently stated in *Helstoski* v. *Meanor,* 61 L.ed 2d 30, 33 (June, 1979.):

> "Almost a hundred years ago this Court explained, 'The general principle which governs proceedings by mandamus is that whatever can be done without the employment of that extraordinary writ, *may not be done with it.* It lies only when there is practically *no other remedy.*' *Ex parte Rowland,* 104 U.S. 604, 617 (1882) (Emphasis added). More recently we summarized certain considerations for determining whether the writ should issue;
>
> > 'Among these are that the party seeking issuance of the writ have no other adequate means to attain the relief he desires, and that he satisfy "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable'." Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed.' *Kerr* v. *United States District Court,* 426 U.S. 394, 403 (1976) (citations omitted.)"

This is what the Supreme Court had in mind when it pointed out that "clearly" its prior determination had not expressed any judgment whatsoever with respect to the questions of GAC's right to arbitrate, its waiver of that right, or the authority of the Santa Fe court to stay its own trial proceedings. Since those questions had not even been determined

by the Santa Fe court when the Supreme Court's prior opinion was announced, it is obvious that they were not embraced within the prior judgment of the Supreme Court. Consequently, they could not be determined by that Court in the original action for mandamus which was pending before it. And as the Supreme Court of the United States pointed out in its footnote 2 (56 L.Ed. 485) the Supreme Court did not disturb the Santa Fe Court's order of December 27, 1977 because it did not regard that order as restricting GAC from pursuing its arbitration claims in other forums.

On July 31, 1978 UNC instituted an action in the United States District Court for the District of New Mexico seeking to enjoin the American Arbitration Association from proceeding with the present arbitration. In addition to injunctive relief the Complaint sought a declaratory judgment that the AAA had no right to proceed with the pending arbitration or to force UNC to participate in it. The Complaint recited the institution of UNC's action against GAC in the Santa Fe court, the removal of that case and its subsequent dismissal by UNC. It alleged the institution of the second action in the Santa Fe court, the filing of arbitration demands by GAC on November 30, 1977, and the December 16, and December 27, 1977 orders of the Santa Fe Court. Concerning the judgment of the Supreme Court of the United States which was handed down on May 30, 1978, the Complaint stated:

> "On May 30, 1978 the U.S. Supreme Court issued its opinion holding that the December 16, 1977 Judgment was in error, and also holding that the Santa Fe County District Court had the power to make the findings of fact, conclusions of law and enter the Partial Final Judgment of December 27, 1977.

The Complaint further alleged that on January 12, 1978 the AAA had suspended the present arbitration and on July 26, 1978 had notified UNC that it was lifting the suspension and at the same time directed UNC to appoint an arbitrator. The Complaint further alleged the entry of the April 4, 1978

Final Judgment of the Santa Fe Court and stated that it was pending on appeal in the Supreme Court of New Mexico.

Count I of the Complaint alleged that the judgments of the Santa Fe Court were *res judicata* and that they barred and collaterally estopped any attempts by the AAA to proceed with arbitration. Count I also asserted that any "arbitration proceeding instituted by the AAA would deprive UNC of the right to receive full faith and credit for the December 27, 1977 and April 4, 1978 judgments of the Santa Fe County District Court guaranteed to it by Article IV Section One of the Constitution of the United States. Moreover, any attempt by the AAA to proceed with arbitration would violate the Federal Arbitration Act, 9 USC §1 *et seq.*"

Count II of the complaint sought a temporary restraining order as well as a preliminary injunction and tendered a bond to secure the payment of any damages suffered by AAA if the temporary restraining order should subsequently be found to be wrongfully entered.

Count III sought damages in a large amount "which may exceed $1,000,000" as a result of AAA proceeding with the arbitration. That Count also sought expenses which "may exceed the sum of $50,000."

Count IV consisted of a detailed description of events which took place with respect to the actions instituted by UNC in the Santa Fe court and the orders and pleadings in those cases. It alleged that as a result of the discovery orders entered by that Court UNC has incurred tremendous expenditures of time, effort and money in the preparation of the case for trial on the merits and has been prejudiced by GAC's failure "to timely demand arbitration" and that UNC would be irreparably injured if arbitration were ordered." It also alleged that GAC was in default and had voluntarily and intentionally relinquished any rights it may have had to arbitrate. Court IV further alleged:

> "The arbitration clause contained in Article XVII of the 1973 Supply Agreement is limited in scope to those issues

which may be resolved by an application of the terms and conditions of the 1973 Supply Agreement. Claims of fraud, antitrust, commercial impracticability or other claims extrinsic to the contract may not be arbitrated.

Count IV further alleged that GAC had failed to elect to proceed with arbitration within a reasonable time and that any right it may have had to do so had lapsed. UNC prayed for a declaration that the AAA had no right to proceed with any arbitration.

Before the United States District Court UNC argued that its Complaint should not be dismissed for want of an indispensable party — GAC — and argued that UNC had no alternative forum. It stated:

> "There is one factor mentioned in Rule 19(b) that UNC believes to be controlling. That is:
>
> > 'whether the Plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.'
>
> This portion of Rule 19(b) requires a court to consider whether the plaintiff can sue effectively in other forums where better joinder would be possible. *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102 (1968); *Pennwalt Corp. Inc.* v. *Train, supra.*
>
> UNC has no other forum available to vindicate its rights. The May 30, 1978 opinion of the U.S. Supreme Court held that a state court may not enjoin arbitration which has been invoked under the Federal Arbitration Act. Only a federal court may do so. Thus UNC has no alternative remedies available to it.

To this argument the American Arbitration Association responded:

> "The Third factor to consider is whether the Plaintiff will have an adequate remedy if the action is dismissed. The obvious answer is arbitration, which Plaintiff voluntarily agreed to utilize in the 1973 Agreement with GAC. All of the issues including those of waiver of the right to

arbitrate could be raised and adjudicated by the arbitrators. *Prima Paint Corp.* v. *Flood & Conklin,* 388 U.S. 395, 18 L.ed2d 1270 (1967) The alternative forum need not be judicial. See *Tewa Tesuque* v. *Morton,* 498 F.2d 240 (1974), *Cert. denied.* 420 U.S. 962, 43 L.ed.2d 440 (1975) where the court held that a New Mexico Pueblo tribal council afforded an adequate forum, thereby warranting dismissal of the Complaint."

In his Memorandum Opinion dismissing the case for want of jurisdiction, Judge Bratton stated:

"UNC has argued that there is no alternative forum, and that only a federal court can enjoin these arbitration proceedings. The AAA, on the other hand, argues that the arbitration panel itself can entertain the questions of *res judicata* and full faith and credit. This alternative appears to be an acceptable one. The language of the arbitration clause in the disputed contract appears broad enough to allow the arbitrators to hear this issue, and the AAA has itself acknowledged that it will consider the question. Though UNC would then have to go to arbitration to determine the initial propriety of the arbitration forum, their arguments would in fact be heard and considered. The inconvenience and cost to UNC of this route does not outweigh the prejudice to GAC if this action continues in its absence. The fact that the alternative forum is non-judicial does not seem relevant. The Tenth Circuit has previously approved consideration of a non-judicial forum, *Tewa Tesuque* v. *Morton,* 498 F.2d 240 (10th Cir. 1974), *cert. denied* 420 U.S. 962, and arbitration is a recognized arena for the settlement of disputes."

After its motion for reconsideration and for an injunction pending appeal had been denied by the Federal District Court, UNC appealed to the United States Court of Appeals for the 10th Circuit. Subsequently, it voluntarily dismissed that appeal.

After the termination of that litigation, the present arbitration panel was designated. UNC designated its arbitrator

under protest. Preliminary hearings were held on December 13, 1978, and January 25 and 26, 1979. Thereafter, in accordance with the instructions of the panel, each party filed an initial statement, followed by a reply statement.

GAC's initial statement of position before the arbitration panel described the 1973 Supply Contract, alleged breach of that contract by UNC, and the remedies for that breach. It also discussed the scope of discovery to be permitted in this arbitration, and the significance of the disqualification of UNC's counsel by the United States Court of Appeals for the Seventh Circuit. (*Westinghouse Electric Corp.* v. *Gulf Oil Corp.*, 588 F2d 221 (1978).

In its first statement of position UNC described certain issues relating to the basic arbitrability of the UNC-GAC dispute under the caption: "Preliminary Issues". It stated that these issues must be resolved before consideration can be given to further proceedings relating to the merits. The preliminary issues so specified by UNC are:

B. *The December 27, 1977 Partial Final Judgment is Entitled to "Full Faith and Credit" and Prohibits Arbitration in the UNC-GAC Disputes.*

C. *The Partial Final Judgment of December 27, 1977 is Res Judicata and Bars further Proceedings Herein.*

D. *The April 4, 1978 Final Declaratory Judgment is Entitled to Full Faith and Credit; is Res Judicata and Bars Arbitration.*

E. *There is no Agreement Extant by Which UNC and GAC Agreed to Arbitrate.*

F. *GAC Made no Timely Election to Arbitrate the Issues It Attempts to Raise Herein, and Arbitration is Accordingly Barred.*

G. *GAC Never Gave Timely Notice to UNC of any Purported Election to Arbitrate the Issues Hereof.*

H. *GAC Lost its Right to Elect to Arbitrate.*

I. *GAC Has Waived its Right to Arbitration.*

J. *Antitrust Issues Are Not Arbitrable.*

K. *Any Remaining Issues are So Intertwined with Antitrust Issues That None Can Be Arbitrable.*

L. *The Arbitration Clause of The 1973 Supply Agreement is Narrow and Allows Few Issues to be Arbitrated.*

M. *As A Matter of Comity The Arbitration Should Not Proceed Until GAC's Two Appeals Are Resolved.*

N. *UNC Is Not a Party To Any Contract With GAC Which Provides For Arbitration.*

O. *Alternatively, GAC is Not the Legal Representative and Successor of Any Party to the 1973 Uranium Supply Agreement.*

UNC's second statement of position reiterated its protest against the "very existence of this arbitration" and any of its proceedings. UNC therefore refused to file any further statement addressing its preliminary issues, its discovery demands or its defenses to GAC's claim, and stated:

> This Second UNC Statement of Position addresses the true "preliminary issues" i.e., whether judgments of the Santa Fe District Court in Case No. 50827 are *res judicata* as to all issues in this proceeding and whether the Panel must accord those judgments "full faith and credit" as required by the Constitution of the United States. The other issues identified as relating to arbitrability are subsumed and merged into the Santa Fe judgments and are also *res judicata* in this proceeding. Consequently, except as specifically noted herein, UNC respectfully declines to address the other matters raised in the Panel's February 5 memorandum to the parties. To do so would expose UNC to an unacceptable risk that it may waive a position otherwise available to it. Any consideration of arbitration other than to dismiss or indefinitely stay the arbitration pending final appellate

review of the Santa Fe judgments deprives UNC of constitutional rights it cannot relinquish.

UNC does address, in detail, the *res judicata* and "full faith and credit" issues below. Those issues are not intertwined with any other conceivable issue in this arbitration and must be determined independently of and before all other issues. To continue further with this arbitration without a determination of the very issues which would moot further proceedings prejudices UNC and denies it the protection of the Constitution. Therefore, UNC respectfully submits that the Panel must decide, as soon as possible, the issues of *res judicata* and "full faith and credit."

UNC's position concerning *res judicata,* collateral estoppel and full faith and credit focuses upon the December 27, 1977, March 27 and April 4, 1978 judgments of the Santa Fe court. The December 27, 1977 judgment which refused to stay the trial on the ground that GAC had waived its rights to arbitration was affirmed by the Supreme Court of New Mexico on May 7, 1979, and GAC's petition for certiorari to review that judgment has been denied by the Supreme Court of the United States. (48 U.S. Law Week 3236, October 7, 1979) The other judgments of the Santa Fe court are pending upon appeal in the Supreme Court of New Mexico. They do not directly bear upon GAC's right to Federal arbitration or the Santa Fe court's jurisdiction to prevent the exercise of that right. We agree with UNC's contention that the unreversed judgment of a New Mexico trial court has the same effect by way of *res judicata* and collateral estoppel, and is entitled to the same degree of full faith and credit, as is a judgment of the Supreme Court of New Mexico. The denial of a petition for certiorari by the Supreme Court of the United States carries no implication or inference concerning that Court's view of the merits of the case. *See, e.g. Hughes Tool Co.* v. *T.W.A.*, 409 U.S. 353, 34 L.ed 2d 577.

UNC's position rests upon the basic principle that the judgment of a court having jurisdiction of the parties and the

subject matter is *res judicata* and entitled to full faith and credit even though it is erroneous. For that principle it relies upon and cites many authorities. The basic principle is sound. It is not, and indeed could not, be disputed. Nor is it disputed that the Santa Fe court initially had jurisdiction of the parties and the subject matter. UNC therefore concludes: "The judgments in Case No. 50827 are entitled to 'full faith and credit' and therefore bar arbitral consideration of all GAC claims in this proceeding."

The difficulty with this conclusion is that it ignores the judgment of the Supreme Court of the United States which squarely held on October 31, 1977, that the Santa Fe court's injunction against arbitration was "in direct conflict with the Supremacy Clause of the Constitution." It also ignores the second judgment of the Supreme Court of the United States, entered on May 30, 1978, which reiterated the conclusion that the Santa Fe court was "without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration or for any other reason whatsoever." UNC contends that because the Supreme Court of the United States did not vacate the December 27, 1977 judgment of the Santa Fe court, it affirmed the jurisdiction of that court to proceed with the trial and to enter its subsequent judgments. For this position it relies upon the two sentences in the Supreme Courts May 30, 1978 opinion which have already been discussed. For the reasons we have stated, we are unable to concur in UNC's interpretation of those sentences.

The authorities cited by UNC and the arguments it advances simply do not address the unique full faith and credit question which this matter presents: What effect is to be given to a judgment entered by a state court after it has unlawfully barred a litigant from pursuing the federal remedy to which he is entitled?

In *Kalb* v. *Feuerstein,* 308 U.S. 433, 440 (N.2) 1940, the Supreme Court made this observation:

> "That a State court before which a proceeding is competently initiated may — by operation of supreme Federal law — lose jurisdiction to proceed to a judgment unassailable on collateral attack is not a concept unknown to our Federal system."

In the exercise of its power under the Commerce Clause of the Constitution of the United States, Congress enacted the Federal Arbitration Act, which gives parties the right to agree to submit to arbitration their disputes arising under contracts involving interstate commerce. The Supreme Court of the United States has twice held that the Santa Fe court exceeded its jurisdiction and violated the Supremacy Clause of the Constitution when it prevented GAC from exercising that right by its injunction.

In *Gordon* v. *Longest,,* 16 Peters 97, 10 L.ed. 900 (1842) a circuit court in Kentucky denied the defendant's motion to remove the action to the Federal court although the action was between citizens of different states and the declaration alleged that the requisite jurisdictional amount was involved. After the circuit court refused to allow removal, it proceeded with the trial before a jury. There was a verdict for the plaintiff, and judgment was entered on the verdict. The Court of Appeals of Kentucky affirmed. The Supreme Court of the United States reversed, holding:

> "The defendant was entitled to a right under the law of the United States; and, on the facts of the case, the judge had no discretion to withhold that right. No objection can be made to the form of the application, nor to the facts on which it was founded. This being clear, in the language of the above act, it was the duty of the State court to "to proceed no further in the cause." " And every step subsequently taken, in the exercise of a jurisdiction in the case, whether in the same court or in the Court of Appeals, was coram non judice.

* * *

One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each State, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress. But this object would be defeated if a State judge, in the exercise of his discretion, may deny to the party entitled to it a removal of his cause.

A more summary remedy might have been pursued by the defendant than the one which this court can now give to him. But the cause being brought before us through the Supreme Court of the State, we reverse the judgment of affirmance by that court, and direct the cause to be remanded, with instructions that it shall be transmitted to the Circuit Court of the State, which shall be directed to enter an allowance of the petition of the defendant for the removal of the cause to the Circuit Court of the United States for the District of Kentucky, nunc pro tunc."

It is not only State courts that are required to honor the Congressional policy in favor of permitting parties to contracts involving interstate commerce to choose to submit their disputes to arbitration instead of litigation. In *Evans* v. *Hudson Coal Co.*, 165 Fed 970 (CA3, 1948), the court held that a motion for a stay pending arbitration asserted a defense of lack of jurisdiction of the subject matter authorized by FRCD Rule 12(b) (1). The court stated:

"Rule 12(b) (1) will authorize the defendant to make an application for a stay pending arbitration if, as a matter of law, the issues presented by the instant suit are referable to arbitration. The pertinent language of Rule 12(b) (1) provides that a defense of "lack of jurisdiction over the subject matter", at the option of the pleader, may be asserted "by motion". If the issues presented by the instant suit are referable to arbitration, the court below, other conditions of the Arbitration Act being met, must grant the stay and hold its hand until arbitration be

completed. It is thus, pending arbitration, deprived of jurisdiction of the subject matter."

And in *Harper Sibley* v. *Tandy Corporation,* 543 F.2d 540, (CA5, 1976) the federal district court had entered a substantial judgment on a jury verdict in favor of the plaintiff after a trial that consumed 14 days and involved 22 witnesses and more than 100 documentary exhibits. The Court of Appeals reversed that judgment on the ground that the defendant's timely motion "to have the contract claims submitted to arbitration and to have the federal securities law claims stayed pending arbitration" should have been allowed. The court said:

> "The parties, by their agreement, committed the resolution of contractual disputes to arbitration. Both the policy behind the United States Arbitration Act and considerations of judicial economy required that Parker's contractual claims be submitted to arbitration and that the federal securities law claims be stayed pending the outcome of those proceedings."

When the foregoing authorities are applied to the present case, the conclusion is inescapable that the Santa Fe Court lacked jurisdiction to proceed after it had unlawfully issued its injunction which prohibited GAC from exercising its Federal remedy. The lack of jurisdiction to issue the injunction appears "on the face of the judgment roll." Unless judgments of the Supreme Court of the United States are to be treated as meaningless gestures, the subsequent proceedings of the Santa Fe court were, in the language of the Supreme Court, "coram non judice," and they are not entitled to full faith and credit.

It is the Panel's determination that all proceedings in the Santa Fe court following the entry of its illegal injunction restraining GAC from exercising its contractual right to arbitrate were coram non judice and that no subsequent proceedings in that court or elsewhere reinvested that court with jurisdiction over the controversy which is the subject of this arbitration. Those subsequent proceedings are therefore not res judicata and they are not entitled to full faith and credit.

* * *

WAIVER

In our consideration of UNC's contention that GAC has waived its right to arbitration, we focus upon the conduct of GAC prior to the invalid order of April 2, 1976. GAC at once attacked that order, and pursued the attack until the order was finally set aside. In the meantime, the Santa Fe court proceeded with the New Mexico litigation. GAC had no alternative. Its failure to defend in that proceeding would have risked default judgment, and any further move toward arbitration would have invited contempt proceedings. When the barrier of the April 2 order was ultimately removed by the Supreme Court of the United States, GAC moved immediately on November 30, 1977, to take this controversy to arbitration. So whatever occurred between April 2, 1976 and November 30, 1977, while GAC was vindicating its contractual right to arbitrate by "a lengthy process of litigation, through several layers of courts" could not legitimately be viewed as constituting waiver by GAC of that right.

The facts underlying UNC's claim that GAC had by its actions prior to April 2, 1976, waived its right to arbitrate are not disputed. The factual record and the arguments of the parties based upon the undisputed facts have been presented to the Panel in documents submitted by the parties in other proceedings which have been incorporated in the Panel record by reference. In considering this issue we shall first state the facts which are relied upon to establish waiver and then discuss their significance.

The first action brought by UNC in the Santa Fe court named GAC and its constituent partners as defendants. It was filed in the Santa Fe court August 8, 1975, and was removed by the defendants to the United States District Court. After UNC's motion to remand had been argued, UNC voluntarily dismissed the case on December 31, 1975. On the same day UNC filed its second complaint in the Santa Fe court. This complaint was identical with the first except that this one did not name as defendants the partners who owned GAC, thus apparently eliminating diversity jurisdiction in the federal

court. No answer had been filed in that proceeding before it was voluntarily dismissed by UNC and although GAC had obtained extensions of time within which to respond to the complaint, the motions for those extensions asserted that time was necessary to determine whether to seek arbitration.

In the second action in the Santa Fe court GAC filed several motions: a motion to disqualify a particular judge; a motion to dismiss for want of personal jurisdiction; a motion to dismiss for failure to join indispensable parties and a motion for an order extending the time within which to answer and to answer interrogatories that had been served with the complaint. The first motion to dismiss asserted that it was filed "without waiving its right to demand arbitration on all causes and issues raised by UNC herein,". The other motions, with the exception of the motion to disqualify, and for extension of time were accompanied by reservations of the right to arbitrate.

On March 12, after UNC had filed an application in the Santa Fe court for a default judgment on the ground that GAC had not answered UNC's interrogatories, a written agreement was signed wherein GAC agreed to answer the interrogatories within twenty days. Nothing was said in that agreement about reserving arbitration rights. UNC then withdrew its application for a default judgment.

During the period prior to the issuance of the injunction against arbitration, GAC also filed an interpleader action in the United States District Court for the District of New Mexico. The complaint in the interpleader action contained the following reservation:

> "The filing and prosecution of this suit is not intended to or deemed to be a waiver of plaintiffs' rights to have arbitration under one or more of the agreements hereafter described as the UNC Agreements or the 1973 Uranium Supply Agreement, except as to those issues that are within the jurisdiction of and are actually and directly determined by this court."

The defendants were UNC and electric public utilities which had entered into agreements with UNC or GUNF for the purchase of uranium concentrate for use in nuclear reactors in generating plants. The action was dismissed in the District Court and the Tenth Circuit Court of Appeals affirmed *(General Atomic Co.* v. *Duke Power Co.* 553 F.2d. 53 (1957). The affirmance was based upon lack of jurisdiction in that GAC was not being subjected to conflicting claims by two or more defendants which arose out of the same obligation of the plaintiff, and that GAC was therefore not a stakeholder in the federal interpleader sense even though it stood to be subjected to conflicting decisions which might hold GAC liable to the utilities and UNC not liable to GAC.

On March 15, 1976 UNC sought and obtained from Judge Felter a ten-day temporary restraining order prohibiting GAC from instituting suit or filing a third party complaint against United Nuclear involving "any of the subject matters of this suit." Hearing on UNC's application for a preliminary injunction was set to be held within ten days.

On or about March 20, counsel for GAC wrote to UNC counsel "advising plaintiff that Duke Power Company had demanded arbitration with GAC and that GAC might seek to require plaintiff's participation if plaintiff chose not to participate." (See UNC's August 6, 1976, Application for Default Judgment.) In what was apparently the same connection, GAC included in its March 23 response to UNC's March 15 motion for a preliminary injunction, this statement: "In order to protect its interest and to avoid inconsistent results, it will probably be necessary for GAC to implead or otherwise joint UNC in some or all of the actions involving the power companies. . . ." This prospect was discussed in considerable detail at a March 24 hearing before Judge Felter on the application for a preliminary injunction. Counsel for defendant confirmed that GAC, "unless restrained by your Honor, may well take some action in North Carolina to make them OUNCo a party to the arbitration where we are already a party. . . ." (Hearing Transcript, pp. 37-38.) UNC counsel stated

to Judge Felter (Transcript, pp. 17-18): ". . . I don't know in how many unknown places in arbitration and other proceedings UNC will be expected to appear. . . . So I ask that the order be expanded under any proceedings, including an arbitration proceeding."

In response to UNC's request, the preliminary injunction stated:

> "It is therefore ordered that General Atomic Company . . . Oiso hereby preliminarily enjoined and prohibited from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, crossclaims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party. . . ."

Since the first action filed by UNC was voluntarily dismissed after it had been removed to the federal court, we do not regard anything that occurred during the pendency of that action as significant insofar as waiver of arbitration is concerned. To the extent that what took place in that action is at all relevant the conduct of GAC in that action clearly indicates its preference for a federal rather than a state forum, as well as its desire not to waive its right to arbitrate.

Again, in the second action filed in the Santa Fe court GAC clearly indicated, in its first substantive motion, its desire not to waive its right to arbitrate. That position was reiterated on numerous occasions. We do not regard as essential that a formal reservation of the right to arbitrate in every procedural step be taken in the course of that action. There is no doubt that GAC's reservations were adequate to inform UNC of its consideration of an arbitration panel as an alternative forum and there could be no possible claim of surprise on the part of UNC. Indeed, it was precisely because UNC

anticipated that GAC would resort to arbitration that it requested the injunction prohibiting GAC from doing so.

The interpleader action filed by GAC in the federal district court indicated a desire for a federal forum and particularly for a forum before which both UNC, as the seller to GAC and the utilities as the ultimate purchasers from GAC might be brought so that the possibility of conflicting judgments could be avoided. And in the interpleader action it was specifically stated that if the federal district court accepted jurisdiction over this entire controversy, GAC would abandon its contractual right to arbitration; and equally specifically that this right was being preserved if the court should decline jurisdiction. Closely comparable situations have been presented in a number of other cases. In *General Guaranty Insurance Co.* v. *New Orleans General Agency, Inc.*, (427 F.2d 824, 5th Cir. 1970.) the defendant in an action for alleged breach of contract responded to plaintiff's complaint by answering and at the same time filing a counterclaim that depended on impleading a third party. Recognizing that the interpleader action might or might not be permitted, the defendant expressly reserved its right to arbitrate under its contract with plaintiff if the interpleader suit should be denied. The Fifth Circuit held that the defendant had acted properly in reserving its right to arbitration under the contract if its attempted interpleader action was unsuccessful. In *Gavlik Construction Co.* v. *H. F. Campbell Co.* v. *The Wickes Corp.*, 526 F.2d 777 (3rd Cir. 1975) the court approved the district court finding in *Gavlik Construction Co.* v. *H. F. Campbell Co.*, 389 F. Supp. 551 (W.D. Pa 1975) that the filing of a third-party complaint in an attempt to consolidate pending actions was "certainly not waiver but . . . a procedurally sound attempt to achieve a desired result." (389 F. Supp. at p. 553).

There are two elements in the present case either of which precludes a finding of waiver of GAC's contractual arbitration right on this record as it stood on April 2, 1976. First, there had been no answer filed to UNC's complaint. In

Chatham Shipping Co. v. *Fertex Steamship Corp.*, 352 F.2d 291, 293 (2d Cir. 1965). Judge Friendly summarized the general rule which has subsequently been applied repeatedly, even to alleged waiver by a party plaintiff: "The cases are altogether clear that the mere filing of an action for damages on a contract does not preclude a subsequent change of mind in favor of arbitration therein provided . . .: the earliest point at which such preclusion may be found is when the other party files an answer on the merits. The Belize, 25 F. Supp. 663, 664 (S.D. N.Y. 1938)."

There is also the general rule that neither a plaintiff's nor a defendant's participation in judicial proceedings will be found to have waived a contractual right to arbitration unless such participation has prejudiced the other party. *Careich* v. *Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir. 1968) "It is not 'inconsistency' but the presence or absence of prejudice which is determinative of the issue" of waiver. *Hart* v. *Orian Insurance Co.*, 453 F.2d 1358 (10th Cir. 1971); *Shinto Shipping Co., Ltd* v. *Fibrex & Shipping Co., Inc.*, 572 F. 2d 1328 (9th Cir. 1978). Although UNC claims prejudice to its position in GAC's March 12 agreement to answer UNC's interrogatories, resulting in UNC's withdrawal of its motion for a default judgment, this clearly did not constitute the "substantial prejudice" which is consistently held to be a necessary ingredient of a waiver finding.

The four cases described by UNC in its brief as supporting its waiver claim are all cases in which a party first asserted, or at least pressed meaningfully, its contractual arbitration right only after plaintiff's complaint had been answered in a judicial proceeding; in three of the four there had also been preceding combinations of counterclaims, discovery procedures, and arguments and hearings in court on the merits of the controverted issues. *The Belize*, 25 F.Supp. 663 (E.D.N.Y. 1938); *American Locomotive Co.* v. *Gyro Process Co.*, 185 F.2d 316 (6th Cir. 1950); *Cornell & Co.* v. *Barber & Ross Co.*, 360 F.2d 512 (D.C. Cir. 1966); *Weight*

Watches of Quebec Ltd. v. *Weight Watchers International Inc.*, 398 F. Supp. 1057 (E.D.N.Y. 1975).

It is the Panel's determination that GAC has not waived its right to arbitration.

* * *

The Panel will advise the parties through the offices of the American Arbitration Association regarding further proceedings in this case.

/s/ WALTER V. SCHAEFER
/s/ WILLARD WIRTZ

AMERICAN ARBITRATION ASSOCIATION

No. 73-10-0078-77

IN THE MATTER OF AN ARBITRATION BETWEEN GENERAL ATOMIC COMPANY (GAC)

AND

UNITED NUCLEAR CORPORATION (UNC)

Protest And Dissent To Partial Award

Res Judicata, Full Faith And Credit
Waiver Of Arbitration

November 9, 1979

This Protest and Dissent to the "Partial Award" in this matter:

- Continues the protest heretofore made and throughout asserted by United Nuclear Corporation, Respondent, that these proceedings are altogether improper and illegal.
- Preserves the protest heretofore made that the "Partial Award" has been improperly promulgated contrary to fair and proper procedure and in disregard of the rights of the undersigned as a designated arbitrator in this proceeding.
- Asserts the "Partial Award " in form and substance to be in manifest error and disregard of law in that it arrogates powers, prerogatives, and privileges to the arbitrators contrary to fundamental law and public policy, is incomplete and lacking fundamental rationality, and is highly negligent in misrepresentation or neglect of admitted facts and rulings of courts in proceedings of utmost relevance herein.

Contrary to assertions of the "unique full faith and credit question which this matter presents", (Partial Award Pg. 25)* and "problems of interpretation of the Supreme Court opinion" (Partial Award Pg. 13), this matter is altogether plain and straightforward.

The United States Supreme Court in Felter I immediately reached the issue and its decision:

> "General Atomic Company (GAC) challenges the validity of an injunction issued by a New Mexico state court restraining it from filing and prosecuting actions against United Nuclear Corporation (UNC) in federal court. We reverse because under Donovan v. City of Dallas, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2 409 (1964), it is not within the power of state courts to bar litigants from filing and prosecuting in personam actions in the federal courts." (98 S.Ct. 76)

The judgment of the Supreme Court accordingly was:

> "The judgment of the New Mexico Supreme Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion." (98 S.Ct. 79)

Nothing suggests the New Mexico state court's admitted jurisdiction (Partial Award Pg. 24) had been forfeited and the court had become "coram non judice".

Felter II came before the United States Supreme Court as one of three proceedings instituted by GAC, all in March 1978. Full details as to the three proceedings, Nos. 77-1236, 77-1237, 77-1269, are provided in Appendix 1, attached.

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* References are to Partial Award, P.A. or Schaefer, Pg. _____; United Nuclear Corporation — UNC; General Atomic Company — GAC; Gulf Oil Company — Gulf; Felter I — (*GAC* v. *Felter*, 434 U.S. 12; 98 S.Ct. 76; 54 L.Ed.2 199 (1977); Felter II — (*GAC* v. *Felter*, 436 U.S. 493; 98 S.Ct. 1939; 56 L.Ed.2 480 (1978); Judge Edwin L. Felter now Justice Edwin L. Felter of the New Mexico Supreme Court.

Suffice it to say:

No. 77-1236 was a Petition for Certiorari to review an order of the Supreme Court of New Mexico entered January 11, 1978 denying a Writ of Prohibition to an order entered by Judge Felter on November 18, 1977 requiring the identification of the "Canadian documents".

No. 77-1237 was a motion of GAC for Leave to File a Petition for Mandamus requiring Judge Felter to vacate the orders of December 16, 1977 staying federal arbitration proceedings and December 27, 1977 declining to stay trial proceedings in New Mexico District Court pending prosecution of federal arbitration on the grounds that rights of arbitration had been waived by GAC and the issues were not subject to arbitration since they were intertwined with violations of the New Mexico State antitrust laws.

No. 77-1269 was a Petition for Certiorari to review an order of the Supreme Court of New Mexico on March 2, 1978 denying GAC's application for original mandamus and prohibition to the entry of a sanctions order and default judgment entered by Judge Felter on March 2, 1978.

All three proceedings were held "in tandem on a conference list". The briefs filed by the parties dealt with the consolidated issues and accordingly the United States Supreme Court was fully aware that the docket in the New Mexico state courts included two final orders then pending on appeal to the New Mexico Supreme Court.

On May 15, 1978, the United States Supreme Court denied certiorari in 77-1236, The Canadian Documents, and in 77-1269 The Sanctions Order and Default Judgment.

Parenthetically, 77-1269 has now been fully briefed and argued before the Supreme Court of New Mexico as Case No. 11988 and No. 12052, consolidated, and awaits decision.

On May 30, 1978, in Felter II, the United States Supreme Court granted Leave to File Mandamus against the December

16 order staying arbitration but refused mandamus as to the December 27 order declining to stay trial proceedings pending arbitration.

The December 27 order was thereafter reviewed by the New Mexico Supreme Court in Case No. 11775 and affirmed on May 7, 1979, _____ N.M. _____, 597 P.2d 290, and certiorari denied by the United States Supreme Court on October 9, 1979 in Case No. 79-190.

Felter II is easily understood against this background. There, the United States Supreme Court directed that the order of December 16, 1977 be vacated or modified:

> "to the extent that it places any restriction whatsoever upon GAC's exercise of its right to litigate arbitration claims in federal forums." 436 U.S. at 497; 98 S.Ct. at 1941

However, as to the issues of arbitrability and waiver, the Supreme Court said:

> "Clearly our prior opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements nor did our prior decision prevent the Santa Fe Court on the basis of such findings from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums." id.

"Preclude" is successor to the old common law plea of precludi non, "the commencement of a replication to a plea in bar, by which the plaintiff says that . . . he *ought not to be barred* from having and maintaining his aforesaid action." The modern preclude, accordingly, is to prohibit or prevent. (Black's Law Dictionary 1060 (5th ed. 1979)

Thus, the United States Supreme Court, with full knowledge of the record in the New Mexico courts, declined to interfere with the pending judicial review by the New Mexico Supreme Court of the December 27, 1977 order, plainly saying its prior

opinion did not prevent the Santa Fe court, on the basis of its findings as to waiver and inarbitrability, from declining to stay its own trial proceedings.

The commentator in 54 L.Ed.2 925 had no problem in interpreting Felter II:

> "And in General Atomic Co. v Felter (1978, US) 56 L.Ed.2 480, 98 S.Ct. 1939, the Supreme Court granted a corporation's motion for leave to file a petition to mandamus a state court with regard to its order staying federal arbitration proceedings by the petitioner against another corporation, on the ground that the order violated the mandate of the Supreme Court in a prior decision in which the Supreme Court had held that under the supremacy clause of the Federal Constitution (Article VI, clause 2), the state court lacked the power to enjoin the petitioner from filing and prosecuting in personam actions in the federal courts. The stay order in question was made after the state court, on remand following the Supreme Court's earlier decision in the case, had modified its injunction to exclude from its terms and conditions all in personam actions in federal courts and all other matters mandated to be excluded from the operation of the injunction by the Supreme Court's opinion. Noting that the state court was not precluded by the Supreme Court's prior decision from making findings concerning whether the petitioner had waived any right to arbitrate or whether such a right was contained in a relevant agreement between the petitioner and the second corporation, and that the state court was not prevented, on the basis of such findings that it might make, from declining to stay its own trial proceedings pending arbitration in other forums, the Supreme Court ruled nonetheless that the state court was without power to interfere with the petitioner's efforts to obtain arbitration in federal forums. The Supreme Court, however, declined to issue a formal writ of mandamus, assuming that its previous judgment would be obeyed by the state court by

promptly vacating or modifying its order staying arbitration proceedings to the extent that it placed any restriction whatever on the applicant's exercise of the right to litigate arbitration claims in federal forums."

The elaborate explanation in the "Partial Award" that the preclude paragraph must be understood as defining postural procedural limits of mandamus (Partial Award Pgs. 13 et seq.) is patently wrong, unnecessary, and oblique.

If the panel had carefully read *Donovan* v. *City of Dallas*, 377 U.S. 408 (1963), they would have learned the issue before the court was *only* the power of the state court to enjoin an action in federal court:

> "Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings in rem or quasi in rem. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. Princess Lida v. Thompson, 305 U.S. 456, 465-468. In Princess Lida this Court said "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." Id., at 466. See also Kline v. Burke Construction Co., 260 U.S. 226. It may be that a full hearing in an appropriate court would justify a finding that the state-court judgment in favor of Dallas in the first suit barred the issues raised in the second suit, a question as to which we express no opinion. But plaintiffs in the second suit chose to file that case in the federal court. They had a right to do this, a right which is theirs by reason of congressional enactments passed pursuant to congressional policy. And whether or not a plea or res judicata in the second suit

would be good is a question for the federal court to decide. While Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances, it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in in personam actions like the one here."

Donovan recognized that even though the injunction was invalid the Texas court retained jurisdiction.

"Whether the Texas court would have punished petitioners [respondents here] for contempt had it known that the restraining order petitioners violated was invalid, we do not know. However, since that question was neither considered nor decided by the Texas court, we leave it for consideration by that court on remand. We express no opinion on that question at this time."

In fact, the return of the Donovan fine subsequently was by order of the Court of Civil Appeals of Texas, 384 S.W.2 724 (1964).

GAC argued this precise issue without success before the New Mexico Supreme Court in the appeal from the December 27 order, 597 P2d. 290 at 309.

"5. Inconsistency of Proceedings

[33] GAC claims that the actions of the trial court were inconsistent with the holdings of the U. S. Supreme Court in General Atomic Co. v. Felter, 434 U.S. 12, 98 S.Ct. 76, 54 L.Ed.2d 199 (1977). This bears on the district court's determination not to stay the trial on the grounds that GAC had waived its right to arbitrate and that the New Mexico antitrust claims were not arbitrable as a matter of law.

In General Atomic, the Supreme Court ruled that, "it is not within the power of state courts to bar litigants from filing and prosecuting in personam actions in the federal

courts." 434 U.S. at 12, 98 S.Ct. at 76. The district court then modified its April 2, 1976 injunction to exclude from its terms and conditions all in personam actions in federal courts "and all other matters mandated to be excluded from the operation of said preliminary injunction by the Opinion of the United States Supreme Court, dated October 31, 1977."

The district court had jurisdiction over the arbitration controversy under the Federal Arbitration Act, at least up to approximately sixty days into the trial of the case on the merits, when GAC made demand for arbitration and moved for a stay in the proceedings. When GAC sought a stay the trial court had the obligation to determine whether the issues involved in the suit were referable to arbitration under the agreements, and whether "the applicant for the stay is not in default in proceeding with such arbitration. . . ." 9 U.S.C. §3. The trial judge made these determinations in favor of UNC. There is nothing in the Supreme Court's decision that prohibits this type of disposition since it comports with the federal statutes.

[34] There was nothing in the amended injunction which prohibited GAC from demanding arbitration in the case to be conducted in any location, so long as an application was made to the district court to stay the pending trial. The Federal Arbitration Act prevented GAC from proceeding with arbitration without an order from Judge Felter. 9 U.S.C. §3.

Furthermore, in General Atomic Co. v. Felter, 436 U.S. 493, 496-97, 98 S.Ct. 1939, 58 L.Ed.2d 480 (1978), decided after argument in this case, the Court observed: "Clearly, our prior opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate. . . . Nor did our prior decision prevent the Santa Fe court . . . from declining to stay its own trial. . . ." "

Elemental research and simple due care would have demonstrated that it was the responsibility of Justice Felter to

determine arbitrability. The panel is aware that diversity of citizenship was lacking between the parties until sometime in 1979; the "Partial Award" contains pages discussing the Bratton decision which determined federal court jurisdiction lacking. (Partial Award, Pg. 15 et seq.)

With minimum effort, the panel could have found Commercial Metals v. Balfour, Guthrie, & Co. Ltd. (577 F.2d 264, CCA5 (1978). In *Commercial,* as here, diversity of citizenship did not exist. There, as here, the state court was able as well as required to apply the United States Arbitration Act.

> "[6] It is clear that the state courts are entirely able, as well as required, to apply the United States Arbitration Act and compel arbitration pursuant to the Act if the statutory requisites are present. Coastal States Gas Producing Co. v. Producing Properties, 203 F.Sup. 956 (S.D.Tex.1962). Indeed, at the request of the parties, we allowed the parties to communicate to the Court, after oral argument, in regard to ongoing state proceedings in which an order compelling arbitration has been sought. It appears to us that the state court is conscientiously fulfilling its duty in deciding the applicability of the Federal Arbitration Act, although, of course, we are not at liberty to speculate as to the correctness of such a determination. We refuse to allow every arbitration agreement concerning a maritime transaction or one involving interstate and foreign commerce to come within the jurisdiction of our district courts through an indirect method that was directly prohibited by Congress. We join the other courts which have considered the matter, and have required an independent jurisdictional basis, Robert Lawrence Company v. Devonshire Fabrics, Inc., suprs; Amalgamated Ass'n, Etc. v. Southern Busline, supra; Warren Bros. Co. v. Community Bldg. C. of Atl., Inc. 386 F.Supp. 656 (M.D.N.C. 1974); C.P. Robinson Const. Co. v. National Corp. for Hous. Part., 375 F.Supp. 446 (M.D.N.C. 1974); Bangor and Aroostock R. Co. v. Maine Central R. Co., supra; Coastal States Gas Producing Co. v. Produc-

> ing Properties, supra, and have refused to fragment the Arbitration Act. Robert Lawrence Company v. Devonshire Fabrics, Inc., supra; Bengor and Aroostock R. Co. v. Maine Central R. Co., supra; Coastal States Gas Producing Co. v. Producing Properties, supra." (577 F.2 264 at 269 (1978))

It will be noted hereafter state courts do pass upon federal rights and those findings are thereafter, as here, entitled to full faith and credit and res judicata.

On remand of 77-1237, the matter came before the New Mexico Supreme Court in Case No. 11775 on June 21, 1978 whereupon Mr. Justice Payne asked John Eastham, Esq., counsel to GAC:

> "Justice Payne: But they didn't decide that the Santa Fe Court has no power to determine if there had been a waiver of that right?
>
> Mr. Eastham: They did not determine that the December 27th Order, which went into waiver, was or was not proper. That is definitely before you gentlemen:"

The "coram non jucide" argument was made fully in the supplemental briefs as it was made thereafter in the Petition and brief for Certiorari to the United States Supreme Court. On May 9, 1979 the New Mexico Supreme Court affirmed the December 37, 1977 order in a full opinion of twenty-three pages, _____ N.M. _____, 597 P.2d 290. This court found not only that GAC had waived its right to arbitrate *but that the issues of violations of the New Mexico anti-trust laws were intertwined with all other issues and not subject to arbitration.* id 309.

The decision was clearly stated in U. S. Law Week 43 L.W. 3236, (Partial Award, Pg. 23) which appeared at the time the

United States Supreme Court denied GAC's Petition for Certiorari:

> "Arbitration — No. 79-190 General Atomic Co. v. United Nuclear Corp. — Ruling below (NM Sup.Ct., 5/7/79):
>
> Federal Arbitration Act, 9 U.S.C. §3, mandates that court in which case is pending and in which stay is requested for arbitration has jurisdiction to determine whether movant is "in default and proceeding with such arbitration"; thus state court, rather than arbitration panel, could decide whether party had waived its rights to arbitration; court will take into consideration all material facts to determine whether party to uranium supply contracts containing arbitration caluse defaulted on its obligation to make timely demands for arbitration and stay of state-court proceedings and thus waived its rights; substantial evidence supports finding that contracting party, which waited until complex, multi-party, multi-issue litigation in which it was involved was within days of final solution at trial level when it first made demand for arbitration, was in default and thus waived its right to arbitration; enforcement of state antitrust laws by courts rather than by arbitrators is entirely consistent with congressional intent, since state and federal antitrust acts serve to protect same societal interest, and since Federal Arbitration Act itself provides that aribtration agreements in contracts involving commerce are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."

Compare the "Partial Award" summary of the May 7, 1979 Decision of the New Mexico Supreme Court:

> "The December 27, 1977 judgment which refused to stay the trial on the ground that GAC had waived its rights to arbitration was affirmed by the Supreme Court of New Mexico on May 7, 1979, and GAC's petition for certiorari to review that judgment has been denied by the

> Supreme Court of the United States." (Partial Award, Pg. 23)

The error in this summary, particularly after citation to U. S. Law Week, is astounding, negligent, and wholly malignant.

The "coram non judice" argument is confined entirely to waiver.

> "So whatever occurred between April 2, 1976 and November 30, 1977, while GAC was vindicating its contractual right to arbitrate by "a lengthy process of litigation, through several layers of courts" could not legitimately be viewed as constituting waiver by GAC of that right." (Partial Award, Pg. 29)

Non-arbitrability of the issues in this proceeding because of the New Mexico anti-trust law has been asserted by UNC from the inception of the controversy between the parties.

Conclusions of fact 9 and 11 and conclusions of law 7 and 8 of the New Mexico District Court Order of December 27, 1977 found anti-trust issues inarbitrable and all issues in the case so intertwined that none could be submitted to arbitration.

The May 7, 1979 Decision of the New Mexico Supreme Court specifically considered these issues at length and affirmed these conclusions.

The Petition for Certiorari filed by GAC in the United States Supreme Court assigned these rulings as grounds for granting the Writ.

The "Partial Award" of the panel enumerates these issues as preliminary and before the panel. Nevertheless, the "Partial Award" does not consider or even mention these issues at all.

— The res judicata claim of UNC included the anti-trust and intertwinement issues as the panel was fully aware. It is altogether improper and in manifest disregard of law for the res judicata claim to be considered or determined dehors these matters.

— The facts and law relating to the anti-trust and intertwinement issues existed prior to the institution of this litigation, prior to the April 2, 1976 injunction, were in no way affected by that injunction, and cannot be reached by any "coram non judice" consideration.

— The public policy of New Mexico is that issues arising under the New Mexico anti-trust statutes and intertwined matters are to be determined by courts and not by privately paid per diem arbitrators, 597 P.2d.290 at 311. This fundamental policy is now disregarded by the panel in its wholly invalid assertion of jurisdiction.

— The "Partial Award" denying res judicata and full faith and credit without consideration of the anti-trust and intertwinement issues is not only incomplete and lacking fundamental rationality but is in manifest disregard of law and contrary to public policy. In fact, any lawyer for any party in this proceeding undertaking to argue the res judicata issue would be guilty of gross malpractice if he were to ignore the anti-trust and intertwinement issues.

The direct decisions described involving the precise parties and issues now appearing and asserted before the arbitration panel are cavalierly noted and dismissed with the comment that the Denial of Certiorari carries:

> "no implication or inference concerning that court's view of the merits of the case" (Partial Award Pg. 23).

On June 6, 1979, N. Lewin, Esq., counsel to GAC, wrote to the panel concerning the May 7, 1979 Supreme Court of New Mexico Decision; he stated:

> "GAC will be filing a Petition for a Writ of Certiorari with the Supreme Court of the United States to obtain review of the New Mexico Supreme Court's recent decision. Because the New Mexico decision rests on fundamental errors of federal statutory and constitutional

law, we are confident that it will be reversed. The time it takes to secure such reversal should not, however, be utilized to delay rulings by this Panel on "preliminary" issues which have long been ripe for decision or to postpone further sessions going to the merits. If this arbitration is now delayed while the validity of the New Mexico decision is being contested by GAC in the Supreme Court of the United States, the effect will be the same as if Judge Felter's stay order of December 16, 1977, and his injunction against arbitration of April 2, 1976 — both vacated summarily by the United States Supreme Court — were still operative." (Appendix 3 attached)

This arbitrator has been particularly interested in hearing the views of the parties as to the three events which occurred subsequent to the March hearings before the panel:

— The affirmance on May 7, 1979 by the New Mexico Supreme Court of the December 27 order of Judge Felter,

— The determination by Judge Enright permitting the filing of the amended complaint in San Diego District Court on August 31, 1979.

— The Denial of Certiorari by the United States Supreme Court on October 9, 1979.

Unfortunately, upon objection, this opportunity has been denied.

While it is true that the Denial of Certiorari by the United States Supreme Court does not create stare decisis, the basic fact is that as between the parties the decision of the New Mexico Supreme Court remains in full force and effect. *Grossgold* v. *Supreme Court of Illinois,* 557 F.2d. 122, CCA7, 1977 at 124,:

"The Illinois Supreme Court, which is fully competent to pass on federal constitutional questions, has passed upon this constitutional question, and its decision became final

when the Supreme Court of the United States denied certiorari. Since the Illinois Supreme Court was bound to pass on the constitutional question posed by the pardon, the court's denial of Grossgold's petition for reconsideration necessarily implied that the constitutional question was being decided against the plaintiff. Consequently, there was no arguable constitutional "deprivation" upon which Section 1343 could operate to provide subject matter jurisdiction. The doctrine of res judicata bars any further litigation of this question.

* * *

We conclude that plaintiff pursued his proper remedy in the Supreme Court of Illinois and subsequently in the Supreme Court of the United States and is bound by the adverse result." 557 F.2d. 122 at 125

Brown v. Allen, 344 U.S. 443; 73 S.Ct. 397, often cited for the proposition that the denial of certiorari "imports no expression of opinion upon the merits of a case" went further, however, to describe the effect as between the parties:

> "But denial of certiorari marks final action on state criminal proceedings. In fields other than habeas corpus with its unique opportunity for repetitious litigation, as demonstrated in Dorsey v. Gill, 80 U.S. App.D.C. 9, 148 F.2d 857, see 7 F.R.D.313, the denial would make the issues res judicata."

Another inexcusable error in the "Partial Award" occurs in its assertion:

> "The other judgments of the Santa Fe court are pending upon appeal in the Supreme Court of New Mexico. They do not directly bear upon GAC's right to federal arbitration or the Santa Fe court's jurisdiction to prevent the exercise of that right." (Partial Award, Pg. 23)

The "other judgment" is the sanctions order finding the 1973 Supply Agreement under which *the right of arbitration is asserted* void and unenforceable. (Partial Award, Pgs. 9 et seq.)

Inherent in the "Partial Award" analysis are:

1. Assumption of a non-existent arbitrable right of judicial review of a judgment and decree entered by a state court, affirmed by the court of last resort of that state after full briefing, argument, and review, and to which the United States Supreme Court, again after full briefing, has denied certiorari. This ennoblement is undertaken by an arbitration panel consisting of paid per diem private citizens, acting on its own behalf, appointed by private corporations acting pursuant to a private contract; thus setting up what one panel member tastefully referred to as the "private jurisprudential system" or "second system of jurisprudence". (San Diego Transcript of Proceedings, March 28, 1979, Pg. 253).

This pretension of authority is breathtaking. In *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 at 414; 44 S.Ct. 149 (1923), plaintiffs filed a Bill in Equity in U. S. District Court for the District of Indiana seeking

> "to have a judgment of a circuit court in Indiana which was affirmed by the Supreme Court of the state declared null and void."

There as here, an attempt at direct review by the Supreme Court of the United States had failed. Mr. Justice Van Deventer, speaking for a unanimous court, affirmed a decree dismissing the complaint:

> "It affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject matter and the parties, that a full hearing was had therein, that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the state on an appeal by the plaintiffs. 131 N.E. 769. If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision,

> whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceedings. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. Elliott v. Peirsol, P Pet. 328, 340, 7 L.Ed. 164; Thompson v. Tolmie, 2 Pet. 157, 169, 7 L.Ed. 381; Voorhees v. Bank* of United States, 10 Pet. 449, 474, 9 L.Ed. 490; Cornett v. Williams, 20 Wall. 226, 249; Ex parte Harding, 120 U.S. 782, 7 S.Ct. 780, 30 L.Ed. 824. Under the legislation of Congress, no court of the United States *other than this court* could entertain a proceeding to reverse or modify the judgment for errors of that character." (Emphasis provided)

Thus, this arbitration panel pretends to authority which no court of the United States, other than the United States Supreme Court possesses.

The extent of this unwarranted pretension is shown in the "Partial Award" itself. Pages 29-37 of the "Partial Award" consider the identical problem of waiver dealt with at length in the opinion of the New Mexico Supreme Court. See 597 P.2d. 290 at 299 et seq.

The "second jurisprudence" doctrine suggests a further interesting alternative. In Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321, CCA6, 1967, Cert. Denied 389 U.S. 991, plaintiffs filed an action in the U. S. District Court challenging an annexation proceeding previously sustained in state court and affirmed by the state Supreme Court. Again, as here, certiorari was denied by the United States Supreme Court. The 6th Circuit Court of Appeals affirmed the dismissal of the complaint saying:

> "State courts are competent to decide questions arising under Federal Constitution. Federal courts do not provide a forum in which disgruntled parties can relitigate federal claims presented to and decided by state courts."

Apparently "second jurisprudence" is more hospitable in providing a forum "in which disgruntled parties relitigate federal claims presented to and decided by state courts."

The panel, in fact, proceeds beyond the position asserted by counsel for GAC. In *Durfee* v. *Duke,* 375 U.S. 106; 84 S.Ct. 242, (1963), the court considered the requirement of full faith and credit and concluded at Pg. 149:

> "There emerges the general rule that a judgment is entitled to full faith and credit — even as to questions of jurisdiction — when the second court's inquiry discloses that these questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."

At San Diego, before this panel, counsel for GAC was asked what application he saw for *Durfee* v. *Duke* (San Diego Transcript, March 28, 1979, Pg. 222):

> "Mr. Lewin: In addition to the fact that Durfee versus Duke involved a jurisdictional determination that had been approved by the Highest Court of the State and for which no Petition for Certiorari had been filed. In other words, a parallel. *If UNC were here and this state court injunction had been affirmed by the New Mexico Supreme Court, and the Supreme Court of the United States had denied certiorari, then we'd agree, Durfee versus Duke would be applicable.* It would say that the state judge had jurisdiction to issue his order." (Emphasis supplied)

The "private jurisprudential system" makes no distinction between direct and collateral attack upon a judgment. Certainly a pretense by a private arbitration panel to void a judgment of a court of last resort of one of the sovereign states must appear collateral unless it be claimed that by some unknown arcane process state and federal constitutions had been amended to confer appellate judicial status upon this private entity. Otherwise, *Gordon* v. *Longest,* (16 Peters 97), *Evans* v. *Hudson,* 165 Fed 970 (CA3, 1948), and *Harper* v.

Tandy, 543 F.2d 540, (CA5, 1976), all involving direct review, are inapplicable.

Stoll v. *Gottlieb*, 305 U.S. 165; 83 L.Ed 104 (1938), reads directly on the point. There the federal court in a corporate bankruptcy proceeding discharged an individual from liability under his guarantee of a corporate obligation. The bondholder subsequently sued in the municipal court in Chicago. Municipal court held for the bondholder on the basis that the federal court had no jurisdiction. The Appellate Court reversed and its judgment was in turn reversed by the Supreme Court of Illinois. The United States Supreme Court reversed saying:

> "That a former judgment in a state court is conclusive between the parties and their privies in a Federal court when entered upon an actually contested issue as to the jurisdiction of the court over the subject matter of the litigation, has been determined by this Court in Forsyth v. Hammond. The respondent, Caroline M. Forsyth, sought by injunction in the Federal court to forbid the City of Hammond from collecting taxes on certain lands, annexed to the city by an earlier state court decree. The city contended that the earlier decree was decisive, the respondent that it was void because the enlargement of a city was a matter of legislative, not judicial, cognizance. Without determining the issue whether annexation itself is a function solely of the legislature. this Court upheld the contention of the city on the ground that the respondent had taken an appeal to the Supreme Court of Indiana from the earlier decree of the trial court against her in the annexation proceedings, and had in that appeal attacked the validity of the decree on the ground of lack of jurisdiction. "Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action

> between other parties, but whether it is not binding between the same parties in that or any other forum."

Also see Moore's Federal Practice, (2d ed. 1975)60.25(2) at 296.

The law of this case itself as made by the parties demonstrates the inapplicability of Kalb v. Feuerstein, 438 U.S. 433 (1940). In the actions brought by UNC in federal district court in New Mexico and again initially in the federal district court for the Southern District of California at San Diego, federal jurisdiction was alleged on the basis of the Federal Arbitration Act. GAC successfully moved in each instance to dismiss on the grounds that the Federal Arbitration Act per se does not confer federal jurisdiction (See Appendix 2).

In contrast, *Kalb* arose under the National Bankruptcy Power where the court concluded:

> "The language and broad policy of the Frazier-Lemke Act conclusively demonstrate that Congress intended to and did deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against applicants without the consent, after hearing, of the bankruptcy court in which the farmers petition was then pending."

and the court explained its decision by saying:

> "It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack. But Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person of property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally. Although the Walworth County Court had general jurisdiction over foreclosures under the law of Wisconsin, a peremptory prohibition by Congress in the exercise of its supreme power over bankruptcy that no

State court have jurisdiction over a petitioning farmer-debtor of his property, would have rendered the confirmation of sale and its enforcement beyond the County Court's power and nullities subject to collateral attack. The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land. The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State or Federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law. If Congress has vested in the bankruptcy courts exclusive jurisdiction over farmer-debtors and their property, and has by its Act withdrawn from all other courts all power under any circumstances to maintain and enforce foreclosure proceedings against them, its Act is the supreme law of the land which all courts — State and Federal — must observe. The wisdom and desirability of an automatic statutory ouster of jurisdiction of all except bankruptcy courts over farmer-debtors and their property were considerations for Congress alone."

Two cases arising under the National Railroad Bankruptcy Act, enacted by the Congress pursuant to the bankruptcy power as was the case with Frazier-Lemke, determine awards made by arbitrators acting pursuant to the Federal Arbitration Act are of no effect against the bankruptcy trustee: *Penn Central Transportation Co.* v. *National Railroad Passenger Corp.*, 560 F.2d. 169, (CCA3 1977) and *National Railroad Passenger Corp.* v. *Blanchette,* 551 F.2d 127, (CCA7 1977), Cert Denied 434 U.S. 856.

The law of this case thus as made by the parties not only demonstrate *Kalb* inapplicable but also determines that rights under the Federal Arbitration Act do not per se confer jurisdiction upon the federal courts or oust the state courts of jurisdiction.

The "second jurisprudence" indeed achieves a peculiar jurisdictional position on its own in relation to the federal

courts of this country. Thus, five pages (See Pg. 18-23) are devoted to the proceedings pursuant to Rule 19B of the Federal Rules of Civil Procedure in the U. S. District Court of New Mexico all overtaken by subsequent events first described, incidentally, in hearing before this panel discussing the reshuffling of interests in GAC between Gulf and Scallop. The fact that this "buy-out" has been held by the Federal District Court in San Diego to create presumptive diversity and thus develop federal subject matter jurisdiction is not even acknowledged even though the panel members themselves are parties to this proceedings and appear before that Federal District Court (Appendix 2 attached)

The pompous, corroding error is the misconception of the prerogatives and function of the panel itself. While GAC and UNC will, for understandable reasons of self-interest, dispute and contest, the proper interpretation of the mandate and decisions of Federal and State courts of last resort and review as well as Federal and State Rules of Civil Procedure are matters of public law not contract between the parties. That issue is, of course, not new. See Mr. Justice Powell in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 56; 94 S.Ct. 1011 at 1022:

> "As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties: "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brant of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation,

courts have no choice but to refuse enforcement of the award." United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 594, 597. 80 S.Ct. 1358, 1361, 4L.Ed.2d 1424 (1960).

Mr. Justice Powell quoted Dean Shulman:

"A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement." Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv.L.Rev. 999, 1016 (1955).

Also see Professor Bernard Meltzer, 43 Chi.L.Rev. 724 (1977) at 730:

"As the Supreme Court observed in Gardner-Denver, those ingredients of arbitration that make it such a valuable adjunct to a system of private ordering, compromise it as an instrument of important public purposes. These ingredients are arbitration's informality, its privacy, its emphasis on finality at the trial level, the ad hoc recruitment of its personnel, and the ecumenical nature of their credentials. Arbitrators, no matter how great their individual competence, lack the institutional credentials that give moral authority to the decisions of the federal judiciary. That authority arises from a complex of tradition and process, including selection processes, the solemnity with which judges typically function, the publicity of their forum, the respectability and expectation of appellate review, and lifetime tenure. Indeed, there is an ironic twist in attempting to provide by contract that ad hoc arbitrators — the most ephemeral of adjudicators — should have the same authority as life-tenured federal judges."

Concern is expressed lest "judgments of the Supreme Court of the United States are to be treated as meaningless gestures" (Partial Award, Pg. 28). The rhetoric is curious. That court denied mandamus to the December 27, 1977 order at the time the court knew from the record before it that this order and the accompanying gargantuan record would be reviewed by the Supreme Court of New Mexico. Following affirmance the Supreme Court denied certiorari knowing that the effect of denial would leave the judgment in full force and effect between the parties. The course suggested for the "second jurisprudence" is not only to make these direct judgments and orders entered after full briefing, argument, and consideration, meaningless; but, in addition, to sanction for GAC double-scoop litigation. The technique is neither new nor commendable. See Mr. Justice Reed in Stoll v. Gottlieb, supra:

> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

* * *

Pursuant to Sections Ten and Eleven of the United States Arbitration Act the "Partial Award" must be vacated, modified, and corrected. The "Partial Award" was improperly promulgated, is beyond the powers of the arbitrators, arrogates to arbitrators illegal and non-existent rights to review and disregard and, in effect, to assert appellate jurisdiction over judgments and decrees of state courts of general jurisdiction, which judgments and decrees have been affirmed after full review by the state court of last resort, and to which affirmance the United States Supreme Court has denied certiorari.

In promulgating the "Partial Award", the arbitrators have imperfectly executed their responsibilities in disregarding and ignoring essential, relevant matters and issues before the panel.

The "Partial Award" is based upon manifest errors and disregard of law. The "Partial Award" must be vacated and then modified and corrected to dismiss these proceedings as provided by law.

APPENDIX L

No. 73 10 0078 77

In the Matter of an Arbitration Between

GENERAL ATOMIC COMPANY

and

UNITED NUCLEAR CORPORATION

Final Award

RECEIVED

(September 12, 1980)

AMERICAN ARBITRATION
SAN DIEGO

During the five years this controversy has been carried through a succession of state and federal courts, twice to the Supreme Court of the United States, there has been no decision on the merits of the underlying issues in dispute. They emerge now as relatively plain and straightforward.

The dispute had its origin in five long term contracts entered into during the period 1966 to 1971 between United Nuclear Corporation (UNC) as producer and seller of uranium, and four electric utility companies as purchasers. As a result of transactions that will be described, UNC became obligated to supply the uranium to General Atomic Corporation (GAC) and GAC became obligated to supply it to the utilities. In August of 1975 UNC stopped making deliveries of uranium and instituted litigation which is still unconcluded.

The Partial Award issued by this Panel on November 14, 1979 recounts the history that preceded it. UNC maintained before the Panel at that stage of the proceedings that the entire matter had been rendered res judicata by decisions of the courts of New Mexico. Following a full hearing on those preliminary issues in March of 1979, the Panel ruled in its

Partial Award that it had jurisdiction to proceed to a determination of the underlying issues on their merits.

Before we discuss the merits of the dispute, it is necessary to state certain further procedural developments.

UNC has refused to accept the Panel's jurisdictional determination. On the last day of the Panel's March, 1979 hearings, UNC filed a complaint for an injunction in the United States District Court for the Southern District of California, seeking to restrain the Panel from proceeding. The complaint was dismissed for want of jurisdiction, as were successive amended complaints and an additional action instituted by UNC. These matters are now pending in the United States Court of Appeals for the Ninth Circuit.

The Panel convened a session on March 24, 1980 to set a schedule for hearings on the merits. Arbitrator Julian H. Levi, member of the Panel appointed by UNC, stated at this session that other professional commitments precluded his participation in further hearings until the middle of June, and UNC counsel insisted to the Panel that UNC "will object violently to being deprived of the services of our arbitrator." Hearings on the merits of the issues in controversy, as they had previously been identified by the parties, were therefore set to begin on June 16, 1980 and to continue, if necessary, through July 11th.

On Friday, June 13th, three days before the start of the scheduled hearings, the American Arbitration Association (AAA) regional office in San Diego, where the hearings were to be held, received two telephone calls. One, from UNC counsel, was to advise that UNC would not participate in the hearings. The other, from Arbitrator Levi, was that he was resigning.

As the hearings opened on June 16, with neither UNC nor Arbitrator Levi present, a UNC emissary appeared only for the purpose of handing to the Panel Chairman and to Arbitrator Willard Wirtz (member of the Panel appointed by GAC) identical letters, signed by UNC Counsel Donnan Stephenson and addressed to all three arbitrators, stating that

"United Nuclear Corporation has not participated in the arbitration except in efforts, undertaken under protest, to procure its dismissal and it will not participate in the arbitration or hearings or proceedings therein. . . ." Five reasons were set out:

1. A valid final judgment of the District Court of Santa Fe County, New Mexico, dated December 27, 1977, has determined that GAC has no right to arbitrate with UNC. This judgment was affirmed on appeal by the New Mexico Supreme Court, and certiorari was denied by the United States Supreme Court. *United Nuclear Corporation* v. *General Atomic Co.* 93 N.M. 105, 597 P.2d 290, *cert. denied,* 444 U.S. 911, 100 S.Ct. 222 (1979).
2. A valid final judgment of the District Court of Santa Fe County, New Mexico, dated April 4, 1978, has determined that the 1973 Uranium Supply Agreement — the contract under which arbitration is sought — is "null, void, unenforceable and of no effect whatever."
3. No arbitrable controversies exist between UNC and GAC since all of their claims respecting the 1973 Uranium Supply Agreement have been merged into and set at rest by the aforesaid judgments.
4. No court has ever determined that any dispute between UNC and GAC is arbitrable or ordered UNC to arbitrate such dispute with GAC.
5. For the reasons stated in the attached June 5, 1980 letter to Mr. John Scrivner of the American Arbitration Association, the so-called neutral arbitrator is not qualified to proceed further.

The last of these points was taken up and acted on first. Only a summary is appropriate here. The June 5 letter referred to is attached to this Final Award as Attachment A-1. At the opening of the June 16 hearings, the Panel Chairman made a statement which is set out as Attachment A-2. Under the AAA Commercial Arbitration rules, in a situation of this

kind the AAA is to determine whether the Arbitrator should be disqualified and inform the parties of its decision, which is conclusive. AAA Regional Representative in San Diego, John Scrivner, communicated the details of this situation to the central AAA offices. At the opening of the June 17 hearing, Mr. Scrivner reported that the disqualification charge had been overruled. This was confirmed by wire of that date to UNC. See Attachment A-3.

The Panel then turned to a consideration of the other stated grounds for UNC's withdrawal. Section 30 of the current AAA rules covering "Arbitration in the Absence of a Party" provides, as does a comparable provision in the rules in effect in 1973, as follows:

> Unless the law provides to the contrary, the arbitration *may* [underscoring added] proceed in the absence of any party which, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The Arbitrator shall require the party who is present to submit such evidence as the Arbitrator may require for the making of an award."

So far as the first provision of Section 30 is concerned, no common law or statutory constraint on proceeding with an arbitration when one party has withdrawn has been found. UNC has not identified any such constraint. Inquiry made of AAA's General Counsel reveals none. The Panel's independent inquiry, though not exhaustive, confirms this.

In exercising the discretion given it under Section 30, the Panel took account of the fact that the first three reasons for non-participation stated by Mr. Stephenson in his June 13 letter had been squarely rejected by the Panel in its Partial Award of November 14, 1979. The only remaining stated reason — that "No court has ever determined that any dispute between UNC and GAC is arbitrable or ordered UNC to arbitrate such with GAC" — can have no meaning apart from the first three assertions, for virtually all arbitration proceeds without prior judicial orders.

It was accordingly determined that the arbitration should proceed under the rule established by Section 30. To follow any other course would obviously sanction a facile means of frustrating the arbitration process.

The Panel then considered, in consultation with AAA regional representative Scrivner, whether the resignation of Arbitrator Levi presented a question separate and apart from the withdrawal of UNC. It was concluded that it did not.

This conclusion was reached with recognition of and respect for the fact that Arbitrator Levi's resignation might or might not be identified with UNC's withdrawal from the proceeding. The virtually simultaneous receipt by the AAA regional office of advice of the two actions on June 13th was taken into account. Arbitrator Levi's telephone call had included no accompanying explanation. A confirmatory letter to Mr. Scrivner, dated June 13 and received on June 17, read in full:

> "I resign effective at once as Arbitrator in the matter of *General Atomic Company* v. *United Nuclear Corporation* — 73-10-0078-77."

Section 20 of the AAA Rules, paralleling a rule previously in effect, provides:

> If any Arbitrator should resign, die, withdraw, refuse, be disqualified or be unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these Rules and the matter shall be reheard unless the parties shall agree otherwise.

Section 14 of the AAA rules (continuing a previous provision) authorizes the AAA to appoint arbitrators where "the parties" fail to do so under the terms of their agreement.

Both Section 20 and Section 14 appear to apply primarily to "neutral arbitrator" situations rather than to "party appointed arbitrators" as these terms are used in the AAA

Rules. They could not, as a practical matter, be applied to a situation in which an arbitration agreement provides for each party's appointment of one of three arbitrators, one of the party-appointed arbitrators resigns, and the party appointing him has terminated its participation in the proceedings.

It was accordingly determined on June 17 to adjourn the hearing until June 23, with formal notice to UNC of this schedule so that there would be opportunity for it to take whatever course it chose concerning its participation in the hearings and its appointment of an arbitrator to replace Mr. Levi. Nothing further was heard from UNC. The hearings were reconvened on June 23, and continued to completion on July 2. On July 2, several hours after the close of the hearings, the AAA Regional office received a further communication from Mr. Levi, confirming his telephone conversation of June 30 with Mr. Scrivner, which Mr. Scrivner had reported informally to the Panel members. Mr. Levi has asked that this letter be placed in the record of these proceedings and the record was reopened for that purpose. (See Attachment A-4)

On June 17 and again at the opening of the Panel hearings on June 23, it was made plain that UNC's nonparticipation in the hearings would not be considered in any way a basis for a default determination by the Panel. Note was taken of UNC's arrangements for daily receipt of the transcript and an electronic tape of each day's Panel hearing. No off-the-record discussions were thereafter held between either member of the Panel and GAC representatives.

The chairman directed attention to UNC's previous representations to the Panel regarding the position it would take with respect to the substantive issues in this case as summarized in UNC's Memorandum of Position, submitted in response to a Panel request:

> UNC will raise all issues determined to be arbitrable that it raised in the Santa Fe case between it and GAC. A short statement of the claim is that UNC has no obligation to deliver uranium to GAC and that the 1973 Supply

> Agreement is void as a result of fraud, economic coercion, breach of fiduciary duties in violation of the New Mexico antitrust statutes, §§49-1-1, *et seq.*, N.M.S.A. 1953 and that performance thereunder is not required because of commercial impracticability.

UNC supplied the Panel at that time with documents from the New Mexico court proceedings that it identified as sufficient to "give the Panel an insight into the issues on the merits," noting, however, that it would expect to expand on this presentation "in the light of further developments and additional information gained."

At a subsequent point in the earlier proceedings UNC stated that it must "respectfully decline the Panel's request to formally and definitively state, discuss or try its defenses to GAC's claims at this stage of the proceeding," but added:

> However, since the issues raised by GAC's 1973 Agreement claims here are identical with those adjudged in Case No. 50827 (the New Mexico proceeding) we can state that, if this arbitration should ever proceed as to all such issues, UNC's offensive and defensive claims will be the same as those raised by UNC's First Amended Complaint and reply to GAC's counterclaims in Case No. 50827, by the applicable provisions of the district court's pretrial order in Case No. 50827, and by UNC's Answer Brief in New Mexico Supreme Court No's 11988 and 12052 (consolidated), with one notable addition. As indicated in UNC's Answer Brief (see, for example, pp. 56, 63 and 68), GAC's violations of the New Mexico Antitrust Act are also violations of the Sherman Act (15 U.S.C. §§1 *et seq.*). Such an additional defense will be asserted by UNC if it should ever become necessary to do so.

UNC submitted to the Panel the four documents referred to. They cover in detail UNC's position and evidence on all points except the one noted. The record before the Panel includes at other points statements from UNC about that exception.

The Panel has considered these various UNC documents and statements in its determination of this case. There was no decision in the New Mexico courts on the merits of these issues; the New Mexico District Court entered a default judgment because GAC had not produced Canadian documents relating to the international uranium cartel. The Panel's Partial Award is a determination that the New Mexico court's action is not a bar to these arbitration proceedings.

II

We turn now to a consideration of the merits of the issues in controversy.

As has been stated, this dispute between United Nuclear Corporation and General Atomic Company had its origin in five long term contracts entered into by UNC with electrical utility companies during the period 1966-1971. Those contracts obligated UNC, which was engaged in mining and milling uranium along with other activities, to sell to the following utilities the indicated quantities of milled uranium (U_3O_8), also called "yellow cake."

Date of Contract	Utility	Quantity
1966	Commonwealth Edison (Dresden)	1,021,000
1967	Illinois & Michigan (Cook I & II)	6,118,000
1969	Detroit Edison	3,818,000
1970	Duke Power Co.	12,100,000
1971	Commonwealth Edison (LaSalle)	6,356,000

Prior to 1970, subsidiaries of Gulf Oil Company were engaged in research and development of a process of producing plutonium from the residual product of nuclear fuel after it is removed from the reactor. (Further development of what was referred to as "mixed oxide fuel" was subsequently suspended, apparently by Presidential order.) Prior to 1970,

Gulf subsidiaries were also engaged in the development of a high temperature gas reactor (HTGR) and were becoming involved in what is known as the "light water reactor" fuel business, the business in which UNC had been engaged.

During the summer of 1970 discussions commenced between Gulf Environmental and Energy Systems (GEES), a Gulf subsidiary, and UNC about the possibility of combining their activities. These negotiations continued, and culminated on July 1, 1971 in the formation of a new corporation, Gulf United Nuclear Fuel Corporation (GUNF), 57% of whose shares were owned by Gulf, and 43% by UNC.

UNC put into the new corporation the five utility agreements and the uranium committed by those agreements as well as its technology, patents, and a contract to supply fuel to the United States Navy. It retained its mining properties and its mining and milling facilities. Gulf put in the facilities of Gulf General Atomic, including a grid manufacturing facility. It also put in a contract which it had to supply 3,200,000 pounds of uranium to a Florida electrical utility, and $8,700,000 in cash. There were commitments for a total of $31,500,000 future loans to GUNF by both parent corporations of which $2,300,000 had been made solely by Gulf, and $5,250,000 by both parent corporations in proportion to their stock ownership before UNC sold its interest in GUNF to Gulf in 1973. GUNF agreed to pay UNC $1,200,000 annually for royalties and $400,000 annually in rent.

In 1972 and early 1973 it became clear to Gulf and UNC that additional financing, far beyond the initial estimates, would be necessary for GUNF. Several circumstances had contributed to this result: delays in nuclear utility plant construction and operation; additional competition; increased costs of production and the cancellation, a few months after GUNF was formed, of the U.S. Navy contract which had been expected to produce an annual profit of $500,000-$600,000.

Both UNC and Gulf attempted unsucessfully to interest third parties in GUNF. The parent corporations then turned to the possibility of one of them buying out the other. On November 1, 1972, Gulf offered to turn over to UNC its entire interest in GUNF for one dollar and "an indemnity from United Nuclear for any liabilities Gulf may have under the various fuel contracts with the five utilities." UNC did not accept that proposal. Negotiations continued, and on August 2 and 3, 1973 Gulf and UNC executives met and exchanged proposals and counter-proposals for the solution of GUNF's problems.

Gulf accepted a UNC proposal which contemplated that Gulf would repay, with interest, the loans which UNC had made to GUNF (approximately $1,892,000) and would buy at their book value ($1,308,000), UNC's shares in GUNF. UNC was having problems with its mining schedules because of the delay in the construction and operation of the utility reactors. It was agreed that UNC would continue until the end of 1978 to assume the risk of utility delay, or "slippage" as it was called, and that thereafter Gulf would assume that risk and all further uranium would be delivered on a fixed schedule then established. The net result was that UNC continued to bear the risk of slippage on approximately 8,000,000-9,000,000 pounds of uranium, and as to the balance of about 15,000,000 pounds Gulf would bear the risk of further slippage and would accept from UNC the uranium called for by the utility contracts on a fixed schedule. The fixed schedule uranium was to be delivered and paid for regardless of utility slippages or contract cancellations, and GUNF was free to dispose of it as it saw fit.

After negotiation, Gulf agreed to a price increase upon the uranium UNC was obligated to furnish: 50 cents per pound on the first 10,000,000 pounds, and 25 cents per pound on the balance, which when all uranium called for by UNC's contracts had been delivered, would amount to $8,700,000.

The agreement also provided for a mutual release of all claims by each of the parties against the other.

After the agreement between UNC and Gulf had been executed and Gulf had bought all of GUNF's stock, General Atomic Company, a partnership owned by Gulf and Scallop Nuclear, a subsidiary of Royal Dutch Shell, was created. Effective January 1, 1974, all of GUNF's rights and obligations under the utility agreements and the 1973 Supply Agreement were assigned to General Atomic Company.

* * *

The price of uranium increased sharply in 1973 and 1974. The 1973 OPEC oil embargo dramatically demonstrated the need for development of alternative sources of energy. Approximately 25% of the total oil consumption in this country is utilized in the production of electricity. Electrical utilities ordered 64 new nuclear reactors in 1973 and 1974. Each of those new reactors would eventually require the production of 13 to 14 million pounds of uranium. There also was a change in the pattern of government contracts for the enrichment of uranium, an essential step in the production of nuclear fuel, which is a governmental monopoly. The government adopted a policy of requiring nuclear utilities to enter into long term commitment contracts for enrichment services. The utilities were thus required to supply the government with fixed schedules for enrichment, and in 1974 the government stopped accepting new contracts for the enrichment of uranium.

Other factors were also operating to increase the demand for uranium. In the fall of 1973 Tennessee Valley Authority requested all of the uranium producers to bid on a block of 86 million pounds of uranium. This request, which apparently was not satisfied, created comment in the trade press as to the adequacy of production facilities in order to meet future demands. Furthermore, during 1973 and 1974 the government policy with respect to the use of recycled material — plutonium and uranium — was changed. The industry had previously anticipated that about 25% of the total demand for fissionable materials to be used in the future would be supplied by recycled material. This prospect was eliminated by

the action of the government, which prohibited the use of recycled fuel.

During 1973-74 the United States had placed an embargo upon the importation of foreign uranium. That embargo continued through 1976 and only began to be relaxed in stages in 1977. After the 1973 oil embargo the French announced that they would no longer sell uranium to other nations and thus the uranium producing areas under French control were removed as a source of supply. Australia also announced a moratorium upon supplying uranium outside of Australia and Canada announced a new export policy requiring assurance of an adequate domestic supply before uranium could be exported. Inflation also played a part in the increase in the price of uranium. Moreover, the cost of producing uranium was increasing during 1973 and 1974 both because it was becoming profitable to mine lower grade ore, and because more stringent federal regulations concerning the safety of mining operations increased the cost.

* * *

The evidence before the Panel establishes UNC's five contracts with the utilities, the 1971 and 1973 supply agreements between UNC and Gulf and the assignment of the 1973 supply agreement to GAC and UNC's nonperformance. This leads to consideration of the various claims UNC advances as justification for its nonperformance. As has been stated, copies of the documents asserting those claims had previously been furnished to the Panel, and summaries of those claims had been put before the Panel by UNC's attorneys in earlier hearings.

UNC contends that it has no obligation to GAC under the 1973 Supply Agreement. This contention appears to be based upon the language of the assignment clause of that agreement, which states that the agreement inures to the benefit of "the legal representatives and successors" of the immediate parties. Such an interpretation would largely deprive the clause of all meaning because unless the word

"successors" includes "assignees", the clause has no significance. The interpretation of the agreement by UNC before litigation was commenced shows that it intended and understood that GAC had succeeded to the rights of Gulf under the 1973 Supply Agreement. That interpretation was demonstrated by UNC's performance as well as by its statements to the Securities Exchange Commission and to its own shareholders and we agree with it.

UNC has also disputed its obligation to deliver uranium on the ground that delivery was not required because a "Limitation of Liability" provision contained in four of its utility contracts permitted UNC to terminate performance and be liable only for the price the utility was to pay for the uranium. But the testimony of the UNC executives who negotiated those contracts, as well as the testimony of a principal executive of one of the utilities, establishes that the limitation of liability clauses were intended to relate only to potential liability under certain guarantees contained in the contracts. They were not intended to apply to an intentional failure to perform.

UNC's principal contention is that it was absolved from any obligation to GAC under the 1973 Supply Agreement by a series of actions by Gulf involving the establishment of GUNF, its administration as a joint enterprise, the purchase of UNC's interest and the negotiation of the 1973 Supply Agreement. These actions are alleged to have constituted fraud, breach of Gulf's fiduciary relationship to UNC as a participant in the joint enterprise, and economic coercion. They created a situation, UNC maintains, in which its performance of the supply agreement became commercially impracticable and impossible.

The evidence does not support these claims. It reflects, to the contrary, the negotiation of an agreement between experienced, competent and informed corporate representatives, full participation by both parties in the joint enterprise according to the terms of the agreement, and an arms-length dissolution of that enterprise when it proved unsucessful.

There is no evidence of UNC's being coerced into action it considered unacceptable at the time it was taken or of its inability at any point to perform its commitments. The evidence is rather that when, after two years of performance under the 1973 agreement, the price of uranium rose sharply, UNC decided to break its commitment so that it could sell its uranium at higher price to other purchasers.

Taking up the UNC contentions in more detail, there is first its claim that during 1970-73 Gulf had misrepresented the extent of its interest in and commitment to the light water fuel reactor business in order to harm or destroy UNC, which had been engaged in that business. The testimony before the Panel establishes however, that Gulf was committed to the light water fuel business both as to initial fabrication and as to the reprocessing of nuclear fuel which has already been mentioned. To that end, it had made significant investments. While Gulf was also interested in the high temperature gas reactor HTGR method, it intended to proceed actively with the development of the nuclear fuel business by both methods. UNC's claim to the contrary can not be sustained.

During the discussions that preceded the formation of GUNF, there had been concern about how the new corporation would obtain the uranium which it needed. The problem was a sensitive one, since both UNC and Gulf were producers of uranium and an agreement between them would obviously be subject to strict scrutiny and perhaps to attack under the antitrust laws. The solution ultimately adopted was that the Gulf subsidiary, Gulf Energy and Environmental Systems, (GEES), would negotiate with GUNF for the sale and purchase of uranium. If those two companies reached an agreement with respect to a supply of uranium, UNC would then have an option to supply 40% of that amount under the terms that had been agreed upon. After GUNF was formed, a potential agreement between GEES and GUNF involving the sale of seven million pounds of uranium to GUNF fell through because GUNF was unwilling to buy except on a requirements schedule, while GEES, which would have had to

purchase in the open market, on a fixed schedule, was unwilling to sell except on a fixed schedule. Subsequently, in the spring of 1972, an agreement was reached for the sale by GEES and purchase by GUNF of 5,200,000 pounds of uranium. The contention that Gulf deliberately refused to supply GUNF with essential uranium is not sustained by the record.

Another pre-incorporation claim asserted by UNC relates to the handling of GUNF's losses for federal tax purposes. A provision in the Internal Revenue Code limited the length of time during which a loss could be carried forward. It was anticipated that GUNF would lose money for a considerable period, which would or might extend beyond the permissible limitation. In order to take advantage of GUNF's financial losses for federal tax purposes, it was agreed that the operations of GUNF would be included in Gulf's consolidated tax returns. This method contemplated that there would be no taxes billed to GUNF as long as Gulf could utilize the tax losses in reducing its own income taxes and that when GUNF ultimately became profitable, its income taxes would be paid by Gulf until all of the tax benefit that had accrued to Gulf as a result of GUNF's losses had been restored. Gulf never took advantage of this provision because it had foreign tax credits during the period in question, and the matter became academic because GUNF never showed a profit.

UNC also claims that it was placed in an impossible financial position by Gulf's breach of its fiduciary duties. UNC had been in the business of light water reactors for a much longer period of time than Gulf, and UNC was the primary source of information as to the amount of necessary capitalization. During the pre-incorporation discussions it was represented by UNC and assumed by Gulf that the "negative cash flow" of GUNF would probably not exceed 35 million dollars. Earlier prognostications made by UNC, which were not disclosed to Gulf's representatives during the negotiations, had indicated a much greater need for cash — in the total amount of 70 million dollars or more.

UNC also charges that Gulf had failed to perform its commitments to furnish financing to GUNF. A rather elaborate pattern of loan agreements, some mandatory and some voluntary, had been negotiated and was set out in the incorporation agreement. There was no obligation upon either parent corporation to supply unlimited funds to GUNF. The distinction between mandatory and discretionary loans is plain upon the face of the agreement, and the record shows that to the extent that Gulf was required to make loans it performed it obligation.

Moreover, the contention of financial impossibility is rebutted by evidence that establishes UNC's ability to finance other major expenditures during the period that it was refusing to make voluntary loans to GUNF in proportion to its stock ownership. A consolidation of naval fuel facilities cost about $10,000,000. The acquisition of the remaining 50% interest in Douglas United cost more than $500,000. In October of 1971 UNC acquired the Plateau Coal Mining Company for $10,000,000, and in addition spent more than $1,000,000 for new equipment. Shortly before April 1, 1974, UNC had acquired an enterprise called TSI for $1,400,000. This enterprise was shut down in 1974. And finally, prior to the 1973 Supply Agreement, UNC had owned more than 50% of Uranium Recovery Corporation, and shortly after that agreement it bought the remaining portion for approximately $5,300,000. UNC's contention that it was somehow put in an impossible financial position because Gulf had violated its fiduciary obligations is not supported by the evidence.

The agreement provides that Gulf would have an option to sell to GUNF 50% of the uranium required after January 2, 1974 for use in reload fuel assemblies to be fabricated thereafter pursuant to UNC's five electrical utility contracts. UNC had a similar option with respect to Gulf's obligation to furnish uranium to the Florida Power Company. The possibility of a fixed obligation on the part of Gulf to furnish 50% of the uranium to meet UNC's commitments had been discussed, but had been discarded for antitrust reasons. No

such undertaking by Gulf was included in the integrated agreement.

UNC also contends that Gulf entered into the formation of GUNF in order to obtain confidential information from UNC for use by Gulf in pricing HTGR fabrication with the intent of eliminating UNC as a competitor and of gaining control of UNC's business and properties. The testimony before the Panel shows, however, that information about light water fuel pricing was a matter of public knowledge, and in any event, would be of no particular value in pricing HTGR fabricated fuel because the techniques and processes in the two types of fabrication are entirely different.

UNC also asserts that Gulf did not intend to manage GUNF in full cooperation with UNC, and did not do so. Concerning this claim, the record shows that a large majority of the employees of GUNF were former UNC employees. The president of GUNF was a former Gulf employee, but the executive vice president and three of the other four vice presidents were former UNC employees. These officers had been agreed upon and jointly named in the preincorporation agreement by Gulf and UNC. Mr. David F. Shaw, president of UNC, testified that UNC had more controls, as a minority partner, than are often found in such arrangements, and that the final result of negotiations between Gulf and UNC, as embodied in the agreement, were acceptable to him. During GUNF's existence, pricing policy was worked out by agreement between the two corporations and UNC had an effective veto power over major corporate decisions.

At an earlier stage in these proceedings UNC counsel exhibited to the Panel a memorandum, prepared by an employee of GEES, apparently to create the impression that Gulf had forced certain unfavorable accounting methods on UNC. The testimony and records show however, that this memorandum was in fact rejected by the Gulf officials to whom it was submitted and that no accounting practices whatsoever were forced upon UNC by Gulf. The memorandum in question is entitled to no more weight than is the

evidence that UNC minimized the losses it incurred during the GUNF period by accounting practices that were technically legal but did not accord with customary accounting practices.

The Antitrust Claim

It appears that UNC has never, in any of its litigation, directly charged Gulf or GAC with violation of the federal antitrust laws. UNC did state before the Panel that if it ever became necessary, such a claim would be asserted, but the claim was never actually put forward. At one stage in the earlier precedings before this Panel, it appeared that such a claim was being made, but after discussion with counsel for both parties, the Panel ruled that the apparent assertion had been inadvertent, and that no federal antitrust claim was before the Panel.

This seemingly unimportant procedural technicality became significant in this case for two reasons: (1) On December 8, 1978 the United States Court of Appeals for the Seventh Circuit held that the attorneys who represent United Nuclear before this Panel, the firm of Bigbee, Stephenson, Carpenter & Creut, were disqualified, because of a conflict of interest from representing UNC in a federal antitrust proceeding against Gulf. (*Westinghouse Electric Corporation* v. *Gulf Oil Corporation, et al.*, 388 F.2d 221.) (2.) UNC repeatedly asserted that the Panel lacked jurisdiction over antitrust claims and that such claims were so intermingled with UNC's assertions of fraud, deceit and violation of fiduciary obligations, that the Panel was without jurisdiction to determine any of the issues in this matter.

Of course the allegation of the existence of an antitrust claim, state or federal, cannot of itself be effective to bar an arbitration. Such a result would render contractual arbitration clauses meaningless, and would frustrate state and federal arbitration statutes. This challenge to jurisdiction, like most others, depends upon the existence of facts. A determination of the existence of those facts is essential to a determination of the legal issue of jurisdiction. If the facts relied upon to

show lack of jurisdiction, in this case the existence of conduct which violates the antitrust statutes, do not exist, the attack upon jurisdiction must be denied. We turn, therefore, to an examination of the facts relied upon to sustain the claims of antitrust violations.

In this proceeding UNC asserts that Gulf and GAC engaged in predatory efforts to control New Mexico uranium and also UNC's uranium. It is asserted that Gulf signed a number of contracts in an effort to tie up huge quantities of uranium during the period when the price was low, and to keep uranium out of competition with the foreign cartel of which Gulf was a member. GUNF needed to purchase uranium for its fabrication work and also for its HTGR reactors. But the record before the Panel makes it entirely clear that Gulf, acting through its subsidiary, Gulf Energy and Environmental Services (GEES) and through GUNF as well as GAC, consistently maintained, until June of 1975, a balance between supply and demand that was as close as possible. In June of 1975, utilities began to cancel their contracts to purchase HTGR reactors and the associated uranium from GAC. The balance was then disrupted because GAC was left with the uranium which it was obligated to buy and had intended to deliver with the HTGR reactors.

In addition to the testimony of officers of GAC and its predecessor Gulf-related subsidiaries, a tabulation of offers to supply uranium to those Gulf subsidiaries and to GAC was received in evidence. It shows that during the period from January, 1966 through March of 1975, those companies rejected 58 offers to sell an aggregate total of 288.4 million pounds of uranium. Of course these rejected offers did not relate solely to New Mexico uranium. But uranium is fungible, and an effort to control the supply of uranium within a single state would be economically meaningless.

Another aspect of the antitrust claim asserted by UNC relates to the acquisition by Gulf of uranium deposits in what is known as the Mt. Taylor properties and its allegedly deliberate delay in developing those properties in order to in-

crease the price of uranium. The uranium deposits in the Mt. Taylor properties were apparently of a higher than average grade of ore, but they also lay at a substantially deeper level than other uranium mines. No uranium had theretofore been mined from so great a depth. The area also contained numerous underground rivers which seriously complicated the mining process. Studies conducted by outside engineers indicated the necessity for substantial expenditures and additional studies before the commercial feasibility of the project could be determined with any degree of certainty. The numerous studies of the engineering situation affords convincing evidence that the project was an extremely difficult one from a physical point of view and an uncertain one from a financial point of view. An internal request for an authorization for the expenditure of corporate funds in connection with the development of Mt. Taylor property dated September 13, 1972 stated:

> "The Mt. Taylor mining project is designed to bring Gulf's east Ambrosia uranium deposits into major production by 1980. These orebodies lie at depths of 3200 to 4200 feet, which is more than twice the depth of any previous sandstone uranium mining. High water flows and high rock temperatures will contribute to make Mt. Taylor an extremely difficult mining situation.
>
> "Before committing to deliver significant amounts of uranium from this deposit we must confirm ore reserves and mining costs by underground development and test mining. This requires an investment on the order of $20,000,000 without having a good fix on the ultimate economics. This pilot investment is of necessity a complete mining plant capable of sustaining development operations in limited production to a toll mill."

The facts do not sustain the claim that Gulf deliberately delayed development of the Mt. Taylor property.

UNC also charges Gulf with violation of its fudiciary duty because it did not disclose its participation in the uranium

cartel to UNC during the period from 1972 until September of 1973, while both companies were owners of GUNF. Testimony of officials of UNC establishes, however, that they knew of the cartel, and of the participation of Gulf by the spring of 1972. The 1971 Supply Agreement preceded the first meeting of representatives of the cartel nations. And after UNC knew of the cartel and of Gulf's participation in it, UNC continued to meet its obligations under the 1973 agreement through 1974 and the first half of 1975.

The government of Canada initiated the uranium pricing agreement with the governments of Australia, South Africa and France as a response to actions of the government of the United States which had closed the uranium market in this country to foreign uranium. The pricing agreement provided that it was not to operate in any of the four participating nations, or in the United States. During the existence of the cartel from the date its first price was fixed, August 17, 1972, through 1974 when its last price was fixed in March of that year, the price of uranium in the United States was consistently higher than the cartel prices, with the exception of two months during that period.

It is unlikely that the cartel had any economic effect upon the price of uranium in this country. In its February 20, 1976, letter to its shareholders UNC stated:

> "Published spot prices of uranium have risen from $6 per pound of U3 08 in early 1973 to $35 per pound in early 1976. We believe that uranium prices now reflect for the first time in the history of the industry a market price determined by a combination of market factors, including costs to replace current reserves, production costs recognizing mining and milling safety and environmental regulations and requirements, and supply and demand factors."

And again, in a May 10, 1977 letter to its shareholders, UNC stated:

> "There has been much discussion regarding the sharp rise in uranium prices since late 1973. Some contend that pre-

sent prices are unreasonably high and cannot be sustained. On the contrary, we believe prices reflect uranium supply-demand realities, and production and replacement cost considerations. Today's uranium prices are very comparable to the $8.00 per pound that prevailed in the 1950's, adjusted for cost, inflation, lower average ore grades, and the increased cost and lost productivity in complying with government regulations."

UNC's Annual Report for its fiscal year 1973 stated that it had sold no uranium during that fiscal year because it felt that the price was too low, and that it was to UNC's advantage to retain its uranium rather than to dispose of it at the then prevailing prices. If the cartel had any effect whatsoever on uranium prices in this country, it was not adverse to UNC, a producer and not a consumer of uranium.

We have already determined that none of UNC's assertions of fraud, breach of fiduciary relationship, or economic coercion is well founded in fact. Those claims are also relied upon by UNC to establish antitrust violations, but their factual basis is no stronger in the antitrust context.

GAC has argued and has presented authorities which indicate that the cartel aspect of UNC's antitrust claim is precluded by the Act of State doctrine and also by the federal constitutional provisions which reserve the conduct of foreign affairs to the federal government. We do not find it necessary to discuss these contentions, or to consider other aspects of federal preemption of state antitrust claims that have been argued by GAC, because the facts do not establish a colorable basis for those claims.

RELEASE

In its rebuttal case, GAC offered evidence concerning identical mutual releases contained in the 1973 Supply Agreement. The terms of the release clause were the subject of particular attention by Gulf's attorneys because during the negotiations that preceded the agreement, one of UNC's representatives referred to a possible claim of breach of con-

fidential relationship on the part of Gulf, and also because a Gulf attorney had been told by a UNC attorney that UNC had been preparing an action against Gulf. As to Gulf and GUNF the release provided:

> "7. As of the Closing Date, UNC shall release and discharge Gulf and the Corporation from all claims, causes of action, debts, obligations, liabilities and duties (except those arising hereunder, those arising under the instruments executed pursuant hereto and those arising under the instruments described in Exhibit C attached hereto) which are owed to UNC by Gulf and/or the Corporation on the Closing Date and in any way arise out of the organization of the Corporation, the business or activities conducted by the Corporation, the management of the Corporation, the Preincorporation Agreement or any instrument executed pursuant to, or in connection with, the Preincorporation Agreement."

This release was the result of negotiations between the executives of the three corporations and their attorneys. We see no reason why it should not be given effect according to its terms.

Commercial Impracticability

As a justification for its breach of the terms of its underlying contracts with the utilities and the 1973 supply agreement, UNC asserts the defense of commercial impracticability. It points to the substantial delays that occurred in the construction and operation of nuclear reactors for which uranium concentrates were to be furnished. It also emphasizes the increases in UNC's costs of production, and it asserts that both of these problems were caused in major part by the acts and omissions of governments and through no fault or neglect of UNC. General inflation is also relied upon.

Under the doctrine of commercial impracticability as expressed in the Uniform Commercial Code, non-delivery is not a breach if performance has been made impracticable by the occurrence of a contingency, the non-occurrence of which was

a basic assumption upon which the contract was made, or by compliance in good faith with any applicable foreign or domestic governmental regulation or order. In such a case the seller is required to notify the buyer seasonably that there will be a delay or non-delivery, and he must allocate his available supply among his customers. The circumstances which have made performance impracticable must have been unforeseen and not within the contemplation of the parties at the time of contracting.

Increased cost alone does not excuse performance in the absence of an unforeseen contingency which alters the essential nature of the performance. Neither a rise nor a collapse of the market is in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. Lack of foreseeability is the key factor in the application of the doctrine. If a future condition is foreseeable or foreseen, it is the responsibility of the contracting parties to guard against it. The party who invokes the doctrine cannot himself have been responsible for the condition of which he complains.

When these principles are applied to the present dispute, it is apparent that the essential conditions for application of the doctrine of commercial impracticability do not exist. To the extent that inflation resulted in increased costs of production, the contracts with the utilities (except the Dresden contract with Commonwealth Edison) contained escalation clauses that were the result of arms length negotiations between UNC and each utility. Commonwealth Edison had flatly refused to agree to any escalation clause, and none was incorporated in that contract. In the case of the other contracts, the escalation provisions were the result of negotiations between UNC and each utility, and as Mr. David F. Shaw, President of UNC stated, if the negotiated escalation provisions turned out to be inadequate, "[T]hat's the risk you take."

During the late 1960's revised federal mining legislation and new or revised administrative regulations increased the

cost of all mining operations. It also appears, however, that these changes were foreseeable and in fact had been foreseen generally throughout the mining industry. There had been substantial industry opposition to the new safety standards and UNC was aware of these developments.

Construction of a nuclear electrical power plant is a major undertaking in terms of time and money, and the testimony of principal operating officials of UNC shows that they had anticipated substantial delays. In the case of the contracts here involved, some instances of delay in reactor construction resulted in the payment of deferral charges by the utilities.

In the uranium industry mining costs increase as the price of the product increases. This phenomenon appears to be the result of internal management decisions that the higher price will make it profitable to extract a lower grade of ore. This occurred in the present case. Finally, UNC's statements to the public, to its shareholders and to regulatory agencies remove any doubt as to the adequacy of UNC's supply of uranium to meet its contractual commitments.

We conclude, therefore, that the claim of commercial impracticability is without merit.

Remedies

The remaining question, regarding appropriate remedies, is considered in the framework provided by the Uniform Commercial Code, as well as the Commercial Arbitration Rules of the American Arbitration Association, which provide:

> The Arbitrator may grant any remedy or relief which the Arbitrator deems just and equitable and within the scope of the agreement of the parties, including but not limited to, specific performance of a contract. . . .

The arbitration clause of the 1973 Supply Agreement leaves the Panel broad discretion so far as remedies are concerned.

The five underlying contracts originally entered into between UNC and the four utility companies called for separate deliveries of a total of approximately 29,500,000 pounds of uranium over a period extending from 1967 to 1986. These deliveries were to supply a number of different reactors, some of which were still under construction.

UNC's original contracts involved a variety of delivery commitments. Some were "fixed" commitments calling for the shipment and acceptance of specific amounts of uranium at specified prices on dates certain. Most were "requirements" commitments with deliveries to be made in accordance with the utilities' needs. All but one of the contracts contained provisions for production cost escalation, as measured by various national indices.

Four deliveries (totaling 1,552,000 pounds) had been made by UNC prior to the establishment of GUNF, and another two (totaling 1,259,000 pounds) were made in 1972 and early 1973. Two additional deliveries (totaling about 1,200,000 pounds) were made by UNC in 1974 and in the first half of 1975, after GAC had succeeded GUNF and prior to UNC's institution of litigation. UNC also made a small delivery directly to one of the utilities in late 1975 and another in 1978.

The remaining commitments under the 1973 Supply Agreement were, then, for the delivery of approximately 24,400,000 pounds of uranium at various times between 1975 and 1986. This is the uranium and these are the delivery commitments for which UNC denies contractual liability and which are included in GAC's claim for damages or other remedy in this arbitration proceeding.

The problems that had afflicted first UNC, and then GUNF, were largely caused by delays (slippages) in the construction and operation of reactors by the utilities. To lessen the impact of future slippages upon its mining operations, UNC had requested, during the negotiations that preceded the execution of the 1973 Supply Agreement, that a substantial

amount of uranium previously covered by requirements type contracts be converted into fixed supply contracts. This request was acceded to. All deliveries originally scheduled for the period up to December 31, 1978 were left, by Article IV of the Supply Agreement, on a requirements basis, and they were itemized in Exhibit B of the Supply Agreement. All deliveries originally scheduled for the period following January 1, 1979 on were to be treated, as between the parties to the 1973 agreement, on a fixed supply basis — to be delivered by UNC and accepted by GAC on the delivery dates originally specified in the contracts between UNC and the utilities regardless of when the utilities called for delivery. The fixed delivery commitments were itemized in Exhibit C of the Supply Agreement. Although Exhibit B does not total the requirements type commitments because of their contingent nature, those commitments covered 24 original deliveries involving what could be approximated as a total of 9,000,000 pounds of uranium. Exhibit C, covering fixed type commitments, itemized 39 delivery dates (on a year-by-year basis from 1979 through 1986) and amounts to a total of 16,167,000 pounds of uranium.

The deliveries made by UNC following the effective date of the 1973 Supply Agreement, totaling approximately 1,000,000 pounds, were against requirement type commitments. There have been no deliveries against fixed type commitments. Of the total, therefore, of some 24,000,000 pounds of uranium which UNC undertook but has failed to deliver or is under present commitment to deliver in the future, approximately one-third (about 8,000,000 pounds) comes under the requirements type commitment, and approximately two thirds (about 16,000,000 pounds) under the fixed type commitment.

* * *

In terms of appropriate remedy, UNC's continuing breaches fall into three categories. The first involves the situations that have arisen since August 1975 in which the delivery dates specified in UNC's contracts with the various utilities

have approached, the utilities have called for delivery, GAC has demanded delivery by UNC, but UNC has defaulted, and GAC has had to provide the uranium from other sources. Some 3,530,311 pounds of uranium have been involved in these instances.

GAC obtained most of this uranium in the spot market. The spot market prices have ranged, for the particular month in which deliveries were made by GAC to the utilities, between $35.00 and $43.25. The contract prices at which UNC was committed to supply this uranium to GAC (including base contract prices, escalation clause effect where applicable, and the 50¢-per-pound over-ride agreed to in the Supply Agreement) would have ranged from $7.30 to $12.06 per pound.

It should be noted that during the period in which it defaulted on its commitments to supply this 3,539,311 pounds of uranium at the prices fixed in its original contracts, UNC delivered approximately 9,000,000 pounds of uranium to other purchasers on contracts entered into after 1975, at prices averaging on an annual basis (from 1976 to 1979) from $31.95 to $41.13 per pound.

GAC claims damages for these delivery defaults by UNC in the amount of $132,741.806. This figure was arrived at by (i) computing the contract prices at the delivery dates including the original base price in the UNC/utility contracts, the 50-cent-per pound over-ride added by the 1973 Supply Agreement, and escalation; (ii) ascertaining the publicly reported spot market price for the various delivery dates; (iii) computing the difference between the contract and spot market prices; (iv) multiplying this by the number of pounds of uranium delivered. To the resulting amount of $112,852,043, interest at 10% from the mid-point of the delivery year to June 30, 1980, amounting to $19,889,763 was added, for a total of $132,741,806.

We have considered various alternative measures and have concluded that the use in this computation of generally

prevailing and reported spot market prices is appropriate. These prices are regularly quoted in a publication, Nuexco, which has wide trade acceptance. There is another monthly quotation of "average delivered prices," which includes prices received under long term contracts; its resulting average prices are therefore considerably lower than Nuexco's spot price averages. It is clear, however, that an "average delivered price" figure is not relevant to the determination of GAC's costs in obtaining from alternative sources the uranium UNC was committed, but failed, to supply. GAC had to go into the spot market to cover those commitments. The spot market prices quoted by Nuexco and used in GAC's computation of damages are also close to those which UNC received for selling to others the uranium it was committed by contract to deliver to these utility companies.

We have also considered whether the damages here should be computed, alternatively, on the basis of costs actually incurred by GAC in obtaining the uranium delivered to the utilities — rather than on the basis of the spot market index. But to the limited extent that GAC took this uranium out of its own inventory, it had to forego what would otherwise have been its opportunity to sell that uranium on the open market and at current prices. The Nuexco quotations of spot market prices have proved and have been accepted as reliable. Their use in the computation of damages here is appropriate.

The addition of interest to the amount of the damage is in accordance with recognized authority and practice. There is a question however, as to the computation of the interest. GAC describes the 10% figure as no more than a rough averaging of the prime interest rate for the period involved here. A more precise calculation of interest is appropriate and

we have recomputed the interest through June 30, 1980 and the total damages as shown in the following table:

1973 Supply Agreement
Missed Deliveries Supplied
To Utilities By GAC

Delivery Date	Damages	Interest to 6/30/80*	Total Damages
1/1976	10,911,885	3,437,244	14,349,129
1/1977	12,959,668	3,175,119	16,134,787
4/1978	13,576,733	2,443,812	16,020,545
5/1979	13,784,848	2,050,379	15,835,227
4/1980	10,465,780	431,713	10,897,493
1/1980	16,489,129	1,360,353	17,849,482
1/1978	16,100,000	2,146,581	18,246,581
6/1979	18,564,000	2,564,145	21,128,145
	112,852,043	17,609,346	130,461,389

* 7% for 1975, 1976 and 1977; 8% for 1978; 12-3/4% for 1979; and 16-1/2% for 1980. Based on average prime rate in each year.

The second category of commitments for which GAC claims money damages includes those with delivery dates prior to June 30, 1980, which have now passed with neither UNC nor GAC making deliveries. A total of 5,433,000 pounds falls within this category. Using the same computational formula that was applied to the missed deliveries by UNC which were in fact delivered by GAC to the utilities, GAC arrives at a damages figure of $149,766,825, to which it has added 10% interest, ($21,690,496) for a total damages figure of $171,457,321. Again we have recomputed the interest at

averages of the prime rate for each year, with the result shown in the following table:

1973 Supply Agreement
Damages and Interest
Missed Deliveries Not Supplied To Utilities

	Damages	Interest To to 6/30/80*	Total Damages
1975	5,170,550	1,809,693	6,980,243
1976	10,837,750	3,034,570	13,872,320
1977	11,534,600	2,422,266	13,956,866
1978	11,492,250	1,838,760	13,331,010
1979	2,360,820	301,005	2,661,825
	16,224,200	2,068,586	18,292,786
	14,659,860	1,869,132	16,528,992
	13,404,100	1,709,023	15,113,123
	14,803,600	1,877,459	16,681,059
	8,337,000	1,062,968	9,399,968
	13,450,400	1,714,926	15,165,326
1980	6,270,125	258,643	6,528,768
	4,288,460	176,899	4,465,359
	4,788,410	197,522	4,985,932
	2,797,500	115,397	2,912,897
	9,347,200	385,572	9,732,772
	148,766,825	20,842,421	170,609,246

* 7% for 1975, 1976 and 1977; 8% for 1978; 12-3/4% for 1979; and 16-1/2% for 1980. Based on average prime rate in each year.

The third category involves UNC's commitments to make deliveries on future dates that have not yet arrived. Money damages based on market price at the time of delivery cannot be computed with respect to these deliveries.

Uranium is not unique, but the legal doctrines that formerly restricted the remedy of specific performance to cases involving land or unique chattels are no longer controlling. Both the Uniform Commercial Code and the rules of the American Arbitration Association authorize the use of specific performance in situations which do not involve unique chattels. Specific performance is the obviously appropriate remedy with respect to this third category of deliveries.

The total quantity of uranium involved in this category is 15,028,007 pounds. Of this total amount 2,754,007 pounds are included in requirement type (Exhibit B) commitments under the 1973 Supply Agreement which originally called for deliveries prior to January 1, 1979 but with respect to which there have been slippages due to changes in utility construction or production schedules. Our determination and award is that UNC make delivery of these amounts to GAC at Supply Agreement prices when and as such deliveries are called for by the utilities and by GAC.

The remaining comitments call for the delivery of 12,274,000 pounds. They are fixed type (Exhibit C) commitments under the 1973 Supply Agreement. Our determination and award with respect to these commitments is that UNC make deliveries to GAC upon the delivery dates, in the amounts and upon the terms specified in the Supply Agreement.

The damages and the specific performance which we award are summarized as follows:

AWARD

Monetary Damages

	Damages
Missed Deliveries:	
Which Have Been Delivered To Utilities	$130,461,389
Which Have Not Been Delivered To Utilities	170,690,246
TOTAL DOLLAR DAMAGES ON MISSED DELIVERIES	$301,181,635

Specific Performance

Delivery of Uranium Substantially on the Following Schedule:

Year	Requirement Type Exhibit B (lbs)	Fixed Type Exhibit C (lbs)
1980	530,000	1,262,000
1981	799,007	2,692,000
1982		2,232,000
1983	1,015,000	1,772,000
1984	410,000	1,772,000
1985		1,772,000
1986		772,000
	2,754,007	12,274,000
TOTAL URANIUM DUE		15,028,007 (lbs.)

We note, finally, the "alternative remedy proposal" made by GAC at the end of the hearing before the Panel. This alternative proposal contemplates that all of UNC's delivery commitments except those which GAC has already covered (the 3,530,311 pounds in the first category) be included in a revised schedule extending into the year 1988. A proposed schedule is set out. It leaves the requirements and fixed supply deliveries for the period from mid-1980 through 1986 as they are in the 1973 Supply Agreement but it defers until

1985 to 1988 the delivery of the 5,443,000 pounds that were not supplied to the utilities during the period between 1975 and mid-1980.

This proposal will result in a substantial monetary advantage to UNC if the market price of uranium stays, as it is currently, below the peak levels of 1975 and 1979. The proposed revised schedule spreads deliveries out over the entire period on a relatively even basis. The alternative proposal is as follows:

ALTERNATIVE AWARD

Monetary Damages

	Damages
Missed Deliveries: Which Have Been Delivered to Utilities	$130,461,389

Specific Performance:

Delivery of Uranium Substantially on the Following Schedule

Year	Requirement type Exhibit B lbs	Fixed Type Exhibit C lbs	Rescheduled Deliveries
1980	530,000	1,262,000	
1981	779,007	2,692,000	
1982		2,232,000	
1983	1,015,000	1,772,000	
1984	410,000	1,772,000	
1985		1,772,000	385,000
1986		772,000	1,283,000
1987			2,295,500
1988			1,469,500
Total	2,754,007	12,274,000	5,433,000
TOTAL URANIUM DUE			20,461,007 lbs.

In the event that UNC accepts this proposal, and notifies GAC and Mr. John E. Scrivner, Regional Director of the American Arbitration Association at San Diego, California, of its acceptance on or before October 15, 1980, the Alternative Award may be considered as the Final Award.

The administrative fees, expenses and arbitrator's compensation totalling $127,490.26 shall be borne equally by the parties. Therefore, respondent shall pay to claimant the sum of $36,045.04 for that portion of the fees, expenses and arbitrator's compensation previously advanced by the claimant to the Association, and respondent shall pay to the American Arbitration Association $793.77 for the balance of the administrative fees, expenses and arbitrator's compensation still due the Association.

/s/ WILLARD WIRTZ
Willard Wirtz

/s/ WALTER V. SCHAEFER
Walter V. Schaefer

September 10, 1980

ATTACHMENT A — 1

BIGBEE, STEPHENSON, CARPENTER,
CROUT & OLMSTED
Attorneys at Law
Bokum Building, 142 W. Palace Avenue
Post Office Box 669
Santa Fe, New Mexico 87501

June 5, 1980

John E. Scrivner
Regional Director
American Arbitration Association
530 Broadway
San Diego, California 92101
Re: Arbitration No. 73-10-0078-88

Dear Mr. Scrivner:

UNC continues to protest any and all proceedings in the above referenced arbitration ("the San Diego arbitration"). Among other things, our protest is on the basis that final New Mexico court judgments have declared that GAC has waived any right it had to arbitrate with UNC, that the disputes between UNC and GAC are non-arbitrable, and that the contract under which these proceedings purport to take place is "null, void and unenforceable." These New Mexico judgments, and the constitutional guarantee to full faith and credit of state court judgments, bar the San Diego arbitration.

With the specific intent not to waive the contention that the San Diego arbitration is without jurisdiction and proceeding unlawfully, we feel compelled to bring certain recently discovered factual matters to the attention of the AAA relating to the qualifications and disclosure obligations of the neutral arbitrator, Walter V. Schaefer. We are reliably informed, and believe the following facts to be true:

1. Mr. Schaefer's son-in-law, a lawyer named Chester T. Kamin, is directly opposed to UNC in an Illinois lawsuit. Mr.

Kamin, a partner in the Chicago firm of Jenner & Block, is lead counsel for Energy Conversion Devices, Inc. ("ECD"), in a suit involving UNC and ECD relating to an agreement to share scientific technology.

2. Mr. Kamin's client (ECD) is controlled, in whole or in part, by Atlantic Richfield Company, whose Anaconda Co. subsidiary is a direct and substantial competitor of UNC in the uranium business.

3. Mr. Kamin's law firm, Jenner & Block, along with this firm, represented UNC in 1976 in its efforts to prevent arbitration involving Commonwealth Edison, Gulf Oil Corporation and General Atomic Company. This Chicago arbitration, like the San Diego arbitration, involves a dispute over uranium supply.

4. The Jenner & Block associate who performed the majority of the work involved in Jenner & Block's representation for UNC in its effort to prevent arbitration was Henry M. Schaffer. Henry Schaffer left Jenner & Block and joined Rothchild, Barry & Myers, the law firm with which Walter V. Schaefer is associated.

5. Mr. Kamin's firm, Jenner & Block, also represents Rio Algom Corporation in Illinois Federal Court in a lawsuit in which Westinghouse has sued Rio Algom and twenty-eight other defendants (including UNC) for violation of U.S. antitrust laws. Gulf and Rio Algom are the only two domestic companies charged by Westinghouse with hindering discovery procedures by placing cartel documents outside the United States in Canada. Westinghouse is currently seeking default judgment against Rio Algom, Gulf and Gulf Minerals Canada Ltd. — the only three companies against whom default judgment is sought for bad faith discovery failures. Obviously, Jenner & Block and Rio Algom share a common interest with Gulf and GAC in minimizing the impact of the uranium cartel and discovery failures relating thereto. This uranium cartel and related discovery failures were the direct cause of the default judgment entered against GAC in the New Mexico litigation.

6. In February, 1980, Gulf filed a request in the Westinghouse antitrust litigation in Chicago that a special master be appointed to hear evidence and render an advisory opinion regarding Westinghouse's allegations of bad faith in discovery by Gulf, Rio Algom and others. On April 13, 1980, Gulf submitted an "anonymous note" to the presiding district judge, recommending that Walter V. Schaefer be appointed as the special master to hear evidence on the uranium cartel related discovery failures of Gulf and the client of his son-in-law's firm, Rio Algom. Gulf's secret suggestion that Mr. Schaefer preside over these hearings occurred after the issuance of the arbitrators' Partial Award which declared the New Mexico default judgment, entered against GAC for its bad faith cartel discovery failures, to be a legal nullity.

7. At a meeting of the San Diego arbitration on December 28, 1978, Mr. Schaefer made a disclosure statement to the parties. However, the facts stated in paragraphs numbered 1 through 6 above were not disclosed by Mr. Schaefer on December 28, 1978 or at any other time during the course of the San Diego arbitration.

In light of Section 18 of the Commercial Arbitration Rules of the American Arbitration Association, the foregoing matters should be of particular interest to you.

Very truly yours,

/s/ DONNAN STEPHENSON
Donnan Stephenson

cc: James F. Stiven

ATTACHMENT A — 2

AMERICAN ARBITRATION ASSOCIATION
(COMMERCIAL ARBITRATION RULES)

No. 73-10-9978-77

In The Matter Of An Arbitration
Between
General Atomic Company (GAC),
and
United Nuclear Corporation (UNC).

Transcript Of Proceedings
Monday Morning Session
VOLUME I
June 16, 1980
San Diego, California
Reported By: Frank O. Nelson, CSR #686

San Diego, California
June 16, 1980
10:05 A.M.
[pp. 3-4]

Justice Schaefer: Are you ready to proceed?

The Reporter: Yes, sir.

Justice Schaefer: Do you have appearances?

The Reporter: Yes, sir.

Justice Schaefer: Very well. Good morning, gentlemen.

(All respond)

JUSTICE SCHAEFER: Mr. Scrivner advises me that he has some matters he wishes to present. Mr. Scrivner?

MR. SCRIVNER: Yes, Judge Schaefer.

At this time I wish to present to you a letter that was written by Mr. Stephenson and directed to me as the Regional Director of the AAA, dated June 5 and received on June 9, 1980.

This is a copy of that letter.

JUSTICE SCHAEFER: Yes. Now, I have seen a copy of this letter. And I would like to make the following statement concerning it:

None of the matters mentioned in this letter are relevant to my qualifications as an arbitrator, or to my disclosure obligations in this case.

I had no knowledge of any of the matters stated in paragraphs 1 through 6 until after I was advised of the existence of this letter.

One further comment: Mr. Henry Shaffer, who is completely unrelated to me, was, according to the records of the firm with which I am of counsel, Rothschild, Barry and Myers, paid by that firm from September 11, 1977 to October 31, 1978.

That concludes what I have to say with respect to that letter.

Do you have any further statement, Mr. Scrivner?

MR. SCRIVNER: Yes, Judge Schaefer, I have.

In response to that letter, I acknowledged the receipt of it by telephone, and confirmed by letter to both parties, and I asked for the comments from General Atomic Company.

On June 11, 1980, I received this letter, Judge Schaefer, from Mr. Stiven representing GAC, in response to my request.

JUSTICE SCHAEFER: I think it would be wise, for the record, to identify these documents.

The first letter to which Mr. Scrivner [end of excerpt]

ATTACHMENT A — 3

AMERICAN ARBITRATION ASSOCIATION
(COMMERCIAL ARBITRATION RULES)

No. 73-10-9978-77

IN THE MATTER OF AN ARBITRATION
BETWEEN
GENERAL ATOMIC COMPANY (GAC),
and
UNITED NUCLEAR CORPORATION (UNC).

TRANSCRIPT OF PROCEEDINGS
TUESDAY MORNING SESSION
VOLUME II
June 17, 1980
SAN DIEGO, CALIFORNIA
REPORTED BY: WILLIAM MACAULEY CSR #311

[p. 5]

JUSTICE SCHAEFER: That is the American Arbitration Association Exhibit A-AAA-3, yes.

MR. SCRIVNER: There was an inquiry yesterday as to the Association's position, the American Arbitration Association's position, relating to the information furnished by these letters, and the interpretation of various rules of the Commerical Arbitration Rules.

Based on the information furnished by both parties and the American Arbitration Association Exhibits A-AAA-1 and A-AAA-2, letters, and by the statement of the neutral arbitrator, and in accordance with Section 19 of the rules entitled "Disclosure and Challenge Procedures," the AAA has

carefully considered all the information furnished and has determined that any challenge to Judge Schaefer's neutrality in these proceedings is overruled, and that the AAA reconfirms Judge Schaefer's appointment as the neutral arbitrator in this matter.

Relating to the section of the rules entitled Section 20, an arbitration in the absence of a party, it is the American Arbitration Association's position that that is a matter to be determined by the arbitrators, as is indicated in Section 53 of the rules which is entitled "Interpretation and [end of excerpt]

ATTACHMENT A — 4

RECEIVED
JULY 2, 1980
AMERICAN ARBITRATION
SAN DIEGO

JULIAN H. LEVI
P.O. BOX 1784
SANTA FE, NEW MEXICO 87501

June 30, 1980

Mr. John E. Scrivner
Regional Director
American Arbitration Association
530 Broadway
San Diego, California 92101

Re: United Nuclear Corporation and General Atomic Company, AAA #73 10 0078 77

Dear Mr. Scrivner:

Confirming my conversation with you this morning:

I have now seen the transcript of proceedings in the above matter before Arbitrators Schaefer and Wirtz held in San Diego on June 16 and 17, 1980.

I note therein discussion of my resignation which makes this communication necessary.

My resignation was in no sense procured, requested, or suggested by United Nuclear Corporation, its counsel, or anyone acting on its behalf.

The decision to resign was my personal decision. On March 11, 1980, I sustained a cerebral episode which resulted in my hospitalization. At the direction of my physician, I now carry a medical history with me at all times. Under these circumstances, I came to the conclusion that in fairness to the

parties, and to my family, I should not continue to act as an arbitrator.

I naturally bitterly resent the aspersions appearing on the record and the now consequent invasion of my privacy.

I appreciate your assurance that you will place this letter on record in the proceedings.

Very truly yours,

/s/ JULIAN H. LEVI
Julian H. Levi

APPENDIX M

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 78-522

UNITED NUCLEAR CORPORATION, a DELAWARE CORPORATION, *Plaintiff,*

v.

AMERICAN ARBITRATION ASSOCIATION, a NEW YORK CORPORATION, *Defendant.*

Memorandum Opinion

(Filed September 27, 1978)

This matter comes on for consideration upon the application of the plaintiff United Nuclear Corporation (UNC) for a preliminary and permanent injunction against arbitration proceedings instituted by the defendant American Arbitration Association (AAA).

The Court having considered the evidence and argument presented at the hearing in this matter, the pleadings and memoranda filed, together with the entire file in this cause, it is concluded that the application for a preliminary and permanent injunction filed by UNC should be dismissed for lack of subject matter jurisdiction.

This action is but one small episode in the larger litigation adventure of UNC and General Atomic Company (GAC) which began in 1975, and involves the construction, interpretation and validity of a uranium supply contract between the parties. A suit to determine these issues was filed in the state district court in Santa Fe County, New Mexico in 1975. After such filing and prior to trial, the state court enjoined

GAC from filing any action of any kind against UNC in any forum other than the Santa Fe court. When this order was held invalid by the United States Supreme Court in *General Atomic Company* v. *Felter* 434 U.S. 12 (1977), GAC demanded arbitration with UNC. The state court again stepped in and issued an order staying the arbitration proceedings. This order remained in effect until again held invalid by the United States Supreme Court in *General Atomic Company* v. *Felter* _____ U.S. _____, 56 L.Ed. 2d 480 (1978), on May 30, 1978. At that point, GAC renewed its arbitration demands, and on July 26, 1978 the AAA informed the parties that it was going to proceed with its administration of the arbitration demand. That decision is the subject of this action.

On July 31, 1978 UNC applied to the United States District Court for a temporary restraining order against the AAA. Jurisdiction of the Court was alleged on diversity of citizenship, 28 U.S.C. 1332. The order was issued that day and has, by agreement of the parties, remained in effect pending this decision in the matter.

To understand the basis for UNC's application for an injunction, it must be noted that the state court rendered a final decision against GAC in the litigation over the 1973 supply agreement on April 4, 1978. In that decision and in the Partial Final Judgments previously entered by the state court in December, 1977, the court found that the contract between the parties was void and unenforceable, and that GAC had waived any right to arbitration. UNC now claims, as the basis for their application for an injunction, that these judgments are *res judicata*. They assert that the state court has already determined both GAC's right to arbitration and the merits of any substantive claims which might be raised in arbitration. Thus they allege that to proceed with arbitration will deny them full faith and credit for these judgments, in violation of Article IV, Section 1 of the United States Constitution.

The AAA has filed a Motion to dismiss the complaint under Rule 19(b) for failure to join an indispensable party. It is the AAA's contention that GAC is an indispensable party

to this action, that its joinder would destroy complete diversity between the parties, and therefore that the action should be dismissed for lack of jurisdiction. GAC, appearing as *amicus curiae*, makes the same argument.

Rule 19 of the Federal Rules of Civil Procedure, 28 U.S.C.A. outlines three situations where because of the interest of an outsider in the action or the interest of the parties in complete relief, a person is found to be a "necessary" party, and required to be joined if feasible. The relevant portion of the Rule states that a person is necessary and shall be joined as a party if:

> "(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest.

It is clear that GAC has an interest in the subject of this aciton, for it is their arbitration demand and the defendant's action upon it which triggered this suit. In fact, it is unclear that the AAA has any interest in this action as they are purely an administrative organization, and as stated at the hearing, do not care whether or not the dispute goes to arbitration. If GAC is not joined, its ability to protect its interest will be seriously impacted. The AAA, because of its neutrality will not act as an advocate to preserve GAC's rights. Yet, a decision in favor of UNC would deny or at least substantially delay GAC's arbitration rights. Thus, GAC does fall within the Rule 19(a)(2)(i) definition of a necessary party.

Though a person need only come within one clause of Rule 19(a)(2) to be a necessary party, it should be noted that GAC is also a necessary party under Rule 19(a)(2)(ii). If GAC is not joined in this action, and therefore not bound by the judgment of this Court, there is a substantial risk that the defendant may incure inconsistent obligations as a result of

GAC's interest in the arbitration proceedings. An injunction against the AAA in this action would halt the arbitration. However, GAC might well institute its own suit to compel arbitration, and if it prevailed, the AAA would be subject to inconsistent, indeed incompatible, court orders. Therefore, under either provision of Rule 19(a)(2), GAC is a necessary party to this litigation and should be joined.

However, GAC is a partnership composed of Gulf Oil Corporation, a Pennsylvania corporation and Scallop Nuclear, Inc., a Delaware corporation. UNC is also a Delaware corporation. For the purposes of diversity jurisdiction the "citizenship" of each member of a partnership must be considered, *Federal Resources Corp.* v. *Shoni Uranium Corp.* 408 F.2d 875 (10th Cir. 1969); *Arbuthnot* v. *State Auto Insurance Association* 264 F.2d 260 (10th Cir. 1959), and there must be complete diversity among the parties. Both Scallop Nuclear, Inc. and UNC are Delaware corporations. Therefore, the joinder of GAC would destroy complete diversity and would deprive this Court of jurisdiction under 28 U.S.C. 1332.

In such a situation, the Court is required, pursuant to Rule 19(b), to determine whether the absent party is indispensable. *Provident Tradesmens Bank* v. *Patterson* 390 U.S. 102 (1968). The test under Rule 19(b) is "whether in equity and good conscience the action should proceed among the parties before [the Court]." *Manygoats* v. *Kleppe* 558 F.2d 556 (10th Cir. 1977); *Wright* v. *First National Bank* 483 F.2d 73 (10th Cir. 1973). To make this decision the Court must consider the four factors outlined in the Rule.

The first factor requires consideration of the possible prejudice to GAC from a judgment rendered in its absence. This is very similar to the initial determination made under 19(a)(2)(i). If a judgment is entered in favor of UNC, GAC will have lost its current arbitration demand, or at least will have it delayed again. Any permanent injunction could amount to a declaration that GAC had waived its arbitration rights. Such a decision would be highly prejudicial to GAC.

Secondly, it seems unlikely that the Court could fashion its relief so as to diminish the prejudice to GAC and at the same time grant the relief requested by UNC. In this situation, the injunction is either granted or it is not. There do not appear to be any protective measures which the Court could use to modify an injunctive order to lessen the prejudice to GAC, and still provide effective relief to UNC.

The third factor outlined in Rule 19(b) has been interpreted to require the courts to examine the public stake in resolving all issues among the parties at one time. *Provident Tradesmens Bank* v. *Patterson, supra.* While this Court could decide the questions presented, and while the AAA is capable of carrying out any order of this Court, GAC would not be bound by such an order, and they could institute legal action elsewhere to compel arbitration. This likelihood of additional litigation, with its attendant costs in time and money, should be avoided where possible.

This possibility is considered in the final factor which requires that the Court determine whether a satisfactory alternative forum exists for the plaintiff. *Provident Tradesmens Bank* v. *Patterson, supra.* UNC has argued that there is no alternative forum, and that only a federal court can enjoin these arbitration proceedings. The AAA, on the other hand, argues that the arbitration panel itself can entertain the questions of *res judicata* and full faith and credit. This alternative appears to be an acceptable one. The language of the arbitration clause in the disputed contract appears broad enough to allow the arbitrators to hear this issue, and the AAA has itself acknowledged that it will consider the question.[1] Though

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[1] The arbitration clause is found in Article XVII of the 1973 Supply Agreement and provides:

> "In the event that *any disputes,* which may arise between the parties during the course of this Agreement, cannot be mutually resolved, either party may elect to submit such disputes to arbitration in accordance with the Rules of the American Arbitration Association. . . ." (emphasis added).

(*cont.*)

UNC would then have to go to arbitration to determine the initial propriety of the arbitration forum, their arguments would in fact be heard and considered. The inconvenience and cost to UNC of this route does not outweigh the prejudice to GAC if this action continues in its absence. The fact that the alternative forum is non-judicial does not seem relevant. The Tenth Circuit has previously approved consideration of a non-judicial forum, *Tewa Tesuque* v. *Morton* 498 F.2d 240 (10th Cir. 1974), *cert denied* 420 U.S. 962, and arbitration is a recognized arena for the settlement of disputes.

Thus the overall balance weighs in favor of a finding that GAC is an indispensable party. The fact that GAC did not move to intervene under Rule 24 does not dictate against this conclusion. Valuable rights belonging to GAC are at stake which cannot be protected either by the parties already present or by the Court through the fashioning of relief. Further, there is an alternative forum where all parties can be joined and can present their claims. Therefore, in equity and good conscience the Court cannot allow this action to proceed without GAC as a party, and since joinder would destroy complete diversity among the parties, it is the judgment of the Court that the action should be dismissed.

UNC has argued that the Court has jurisdiction independent of diversity of citizenship grounds under 28 U.S.C. 1331 in that their claim arises under the full faith and credit clause of Article IV, Section 1 of the United States Constitution. If this were so, GAC could be joined and the action could proceed regardless of the citizenship of the parties. However, the full faith and credit clause alone has never been found to be a sufficient basis for jurisdiction under §1331. In *Minnesota* v. *Northern Securities Co.* 194 U.S. 48 (1904), the Supreme Court considered whether an allegation that state statutes

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There is no express reservation of any issues from arbitration and in that case, it is presumed that all questions, both as to law and fact are in the jurisdiction of the arbitrators. *Continental Materials Corp.* v. *Gaddis Mining Co.* 306 F.2d 952 (10th Cir. 1962).

would be denied full faith and credit constituted a case arising under the Constitution sufficient to sustain federal court jurisdiction. The Court said:

> "We do not think that the clause of the Constitution above quoted has any bearing whatever upon the question under consideration. It only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a state other than that in which the Court is sitting. . . [T]o invoke the rule which it prescribes does not make a case arising under the Constitution or laws of the United States. 194 U.S. at 72.

The rule has been followed consistently by the lower courts faced with the question, *California* v. *Bruce,* 129 F.2d 421 (9th Cir. 1942); *Luterman* v. *Levin,* 318 F.2d 11 (D.Md.1970), and has been noted with approval elsewhere. *Hazen Research Inc.* v. *Omega Minerals, Inc.,* 497 F.2d 151 (5th Cir. 1974); 1A *Moore's Federal Practice* ¶ 0.311[2], at 3413 (2d.ed.).

The cases relied upon by UNC do not hold to the contrary. In *West Side R.R. Co.* v. *Pittsburgh Construction Co.,* 219 U.S. 111 (1911), the Supreme Court found that a claim under the full faith and credit clause presented a federal question for their review but did not consider whether such a claim was an independent basis for federal court jurisdiction. Similarly, in *Clifford* v. *Williamson,* 131 F. 100 (C.C.N.D. Wash. 1904) the court did not find the full faith and credit clause to be a basis for federal jurisdiction. In fact, the court specifically said the clause establishes "a rule of evidence, rather than a ground of jurisdiction," *Clifford* v. *Williamson, supra* at 105. While recognizing that a denial of full faith and credit would constitute a violation of the Constitution sufficient to allow a federal court to issue a writ of habeas corpus, the court never stated such would also establish federal question jurisdiction under §1331. The other cases cited speak to the importance of the full faith and credit clause in our

jurisprudence, but do not hold that it is a basis for jurisdiction under §1331. *See Riley* v. *New York Trust Co.*, 315 U.S. 343 (1942); *Durfee* v. *Duke*, 375 U.S. 106 (1963).

Therefore, the Court having determined that GAC is a necessary party under Rule 19(a) and that its joinder would deprive the Court of jurisdiction, and further that in equity and good conscience this action cannot proceed without it, and thus that GAC is an indispensable party under Rule 19(b), and there being no other basis for jurisdiction, it is concluded that this action should be dismissed. An Order will be entered in accordance herewith.

/s/ HOWARD BRATTON
United States District Judge

APPENDIX N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 79-329-E

UNITED NUCLEAR CORPORATION, *Plaintiff,*

v.

GENERAL ATOMIC COMPANY, *Defendant.*

Civil No. 80-339-E

UNITED NUCLEAR CORPORATION, *Plaintiff,*

v.

GULF OIL CORPORATION, *Defendant.*

Memorandum Decision

(Filed May 7, 1980)

United Nuclear Corporation filed its first lawsuit in this court against General Atomic Company, a partnership composed of Scallop Nuclear, Inc. and Gulf Oil Corporation. In three previous memorandum decisions, this court decided that neither federal question jurisdiction nor diversity jurisdiction existed, and that United Nuclear would not be given a third chance to state a basis for this court's jurisdiction over the dispute. Frustrated in its attempt to drop the partnership as a defendant and substitute only the diverse partner, Gulf Oil Corporation, United Nuclear has filed a new lawsuit against Gulf alone. In addition, it seeks a preliminary injunction preventing the resumption of arbitration and an injunction pending appeal in the case previously dismissed. Gulf moves the court to dismiss the new lawsuit for failure to join an in-

dispensable party, the partnership General Atomic Company. Upon due consideration of the parties' memoranda and the arguments advanced at the hearing, and for the reasons set forth below, the court dismisses the action for failure to join General Atomic Company and denies the motions for injunction.

The joinder of parties needed for just adjudication is governed by Federal Rule of Civil Procedure 19, which sets forth a two-part analysis. First, the court must determine whether the absent party should be joined if feasible. The considerations at this juncture are whether complete relief can be afforded among those already parties or whether the missing party claims an interest in the subject of the action and is so situated that the disposition of the action may impair his ability to protect that interest or leave any party subject to multiple or inconsistent obligations. If the absent party fits either of these criteria he should be joined. If he cannot be made a party, the court proceeds to the second part of the analysis to determine whether "in equity and good conscience" the action should be dismissed. In making this determination, the court should consider the extent to which a judgment rendered in the party's absence will be prejudicial, the extent to which the judgment can be shaped to avoid prejudice, whether the judgment will be adequate, and whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In the instant case, General Atomic Company has an interest in the subject of the action, which is the arbitration proceeding in San Diego. General Atomic initiated the arbitration proceedings which United Nuclear Corporation seeks to enjoin through this lawsuit. United Nuclear seeks to use a state court judgment it obtained against General Atomic as a bar to arbitration. The partnership has an interest in the resolution of these *res judicata* claims. United Nuclear has recognized this interest by prosecuting its previous action against General Atomic on alternate jurisdictional theories for almost a year before attempting to substitute only Gulf Oil

Corporation as a defendant. To afford complete relief among the parties, the partnership, which initiated the arbitration proceedings, should be joined. The court concludes that General Atomic Company is a party to be joined if feasible.

General Atomic cannot be joined without destroying diversity among the parties, so the court must consider whether in equity and good conscience the action may proceed with the present parties. The first factor to be considered is the prejudice to the absent party. This test is closely related to the preliminary question of whether the absent party has an interest in the litigation. 3A *Moore's Federal Practice* ¶ 19.11, at 19-233 (1979 ed.). If United Nuclear succeeds in its suit to enjoin Gulf from participating in the arbitration proceedings, General Atomic's requested arbitration will be seriously undermined.

The second factor the court should consider is whether it can tailor any possible judgment to avoid prejudice to the absent party. If this court were to take jurisdiction of this suit to enjoin arbitration, and were to hold that the judgment rendered by the New Mexico state court against General Atomic is *res judicata,* such an order could not be modified to avoid prejudice to General Atomic Company.

The third factor is whether a judgment rendered in the party's absence would be adequate. Although it may be possible to put an end to the arbitration through a judgment against Gulf Oil alone, the Supreme Court in *Provident Tradesmens B. & T. Co.* v. *Patterson,* 390 U.S. 113, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968), stated that a judgment's adequacy should also be tested with reference to the "interest of the courts and the public in the complete, consistent and efficient settlement of controversies." *Id.* at 111, 88 S. Ct. at 739. A complete and efficient judgment would include the partnership, which initiated the arbitration proceedings. Moreover, it is questionable if a judgment against Gulf Oil would also be binding on Scallop Nuclear, Inc., General Atomic's other partner.

The final factor to be considered is the adequacy of alternative remedies. Judge Bratton held in a similar suit against the American Arbitration Association to enjoin the San Diego arbitration that General Atomic Company was an indispensable party and that an adequate alternative forum — arbitration — existed for resolution of the *res judicata* and full faith and credit claims. The parties have submitted these claims to the arbitration panel in San Diego and have received an opinion, demonstrating that the alternative forum is indeed available and being utilized. Moreover, in the arbitration forum, all parties may be included.

The court does not believe an injunction against arbitration is warranted in any event, either as a preliminary matter or pending appeal in either case. The standards used in this circuit for testing such a request are set forth in *Wm. Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir. 1975), and *Benda* v. *Grand Lodge of the Internat'l Assoc. of Machinists*, 584 F.2d 308, 315 (9th Cir. 1978). Those cases describe two tests used for testing an application for an injunction. The moving party must demonstrate either (1) probable success on the merits and the possibility of irreparable injury or (2) serious questions are presented and the balance of hardships tips sharply in movant's favor. These tests are not to be rigidly applied, but instead represent extremes along a continuum. If the showing of success on the merits is particularly strong, the showing of irreparable injury need not be as compelling. However, if success on the merits is not "probable," the balance of hardships must favor the movants.

In the instant case, serious questions are presented by the fact that a state court judgment exists which holds that the parties have waived arbitration. However, the potential success on the merits cannot be characterized as "probable." The arbitration panel has already considered the issue and decided that the state court decision was *coram non judice*— that is, taken by a court without power to act. Accordingly, it found that the state judgment was not entitled to full faith and

credit. In addition, the review of an arbitration decision is limited under the Federal Arbitration Act, imposing upon the plaintiffs herein a more difficult task in convincing this court that the arbitration panel erred. In reviewing the arbitration panel's decision the court believes that there is considerable merit to the conclusions reached by the panel.

Because serious questions are presented, plaintiff must show that the balance of hardships tips in its favor. The plaintiff's asserted injury is the time and expense of arbitration, coupled with the fact that the pendency of the lawsuit unfavorably affects its ability to do business. However, the Supreme Court has held, albeit in another context, that "mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24, 94 S. Ct. 1028, 39 L. Ed. 2d 123 (1974). In addition, it is likely that any substantial commercial litigation will affect the business prospects of the companies involved. This result is no less true for the plaintiff than it is for the defendant. This argument could be used to justify a preliminary injunction whenever a large company is involved in a major legal action.

Plaintiff also argues that it suffers irreparable injury because its constitutional rights to have its New Mexico judgment enforced are being violated by the arbitration panel. It argues that the public has an interest in ensuring the validity of state court judgments. However, United Nuclear will not be precluded from seeking review of the arbitration decision at all. Instead, it will be required to seek review of the entire arbitration award through a motion to vacate or confirm the award. In addition, the public interest may just as well be served by the arbitration of disputes and review of an eventual decision only when a complete award is had.

For the reasons stated above, the court would decline to grant plaintiff's request for a preliminary injunction, or an injunction pending appeal in either case.

It is so ordered.

DATED: May 6, 1980.

/s/ WILLIAM B. ENRIGHT
William B. Enright, *Judge*
United States District Court

Copies to:
Plaintiff
Defendants